373 N.C.—No. 4 Pages 260-291

RULES OF THE DISPUTE RESOLUTION COMMISSION; STANDARDS OF PROFESSIONAL CONDUCT FOR MEDIATORS; RULES FOR MEDIATED SETTLEMENT CONFERENCES AND OTHER SETTLEMENT PROCEDURES IN SUPERIOR COURT CIVIL ACTIONS; RULES FOR SETTLEMENT PROCEDURES IN DISTRICT COURT FAMILY FINANCIAL CASES; RULES OF MEDIATION FOR MATTERS BEFORE THE CLERK OF SUPERIOR COURT; RULES OF MEDIATION FOR MATTERS IN DISTRICT CRIMINAL COURT; RULES OF MEDIATION FOR FARM NUISANCE DISPUTES

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

APRIL 17, 2020

MAILING ADDRESS: The Judicial Department
P. O. Box 2170, Raleigh, N. C. 27602-2170

THE SUPREME COURT
OF
NORTH CAROLINA

Chief Justice

CHERI BEASLEY

Associate Justices

PAUL MARTIN NEWBY
ROBIN E. HUDSON
SAMUEL J. ERVIN, IV
MICHAEL R. MORGAN
ANITA EARLS
MARK DAVIS

Former Chief Justices

RHODA B. BILLINGS
JAMES G. EXUM, JR.
BURLEY B. MITCHELL, JR.
HENRY E. FRYE
I. BEVERLY LAKE, JR.
SARAH PARKER
MARK D. MARTIN

Former Justices

ROBERT R. BROWNING
J. PHIL CARLTON
WILLIS P. WHICHARD
JAMES A. WYNN, JR.
FRANKLIN E. FREEMAN, JR.
G. K. BUTTERFIELD, JR.
ROBERT F. ORR
GEORGE L. WAINWRIGHT, JR.
EDWARD THOMAS BRADY
PATRICIA TIMMONS-GOODSON
ROBERT N. HUNTER, JR.
ROBERT H. EDMUNDS, JR.
BARBARA A. JACKSON

Clerk

AMY L. FUNDERBURK

Librarian

THOMAS P. DAVIS

ADMINISTRATIVE OFFICE OF THE COURTS

Interim Director
McKinley Wooten

Assistant Director
David F. Hoke

OFFICE OF APPELLATE DIVISION REPORTER

Harry James Hutcheson
Jennifer C. Peterson
Alyssa M. Chen

SUPREME COURT OF NORTH CAROLINA

CASES REPORTED

FILED 24 JANUARY 2020

HEADNOTE INDEX

TERMINATION OF PARENTAL RIGHTS

Best interests of child—likelihood of adoption—developmental challenges— The Supreme Court rejected respondent-mother's argument that her children were unlikely to be adopted due to their serious developmental challenges and that the trial court therefore abused its discretion by terminating her parental rights. The evidence and findings supported the trial court's conclusions that the children had a high likelihood of adoption by specific prospective adoptive parents. **In re J.H., 264.**

Best interests of child—placement with relative—evidence showing availability—The trial court did not abuse its discretion by concluding that termination of a father's parental rights would be in his child's best interests, and the court was not required to make findings on whether the child could be placed with a relative. Even though the paternal grandmother had been offered as a relative placement option in a previous proceeding, the county department of health and human services (DHHS) had refrained from recommending placement with her because of concerns about her finances, transportation, and criminal history, and the trial court had determined that the child's best interests would be served by remaining in DHHS custody rather than being placed with a relative. **In re S.D.C., 285.**

Grounds for termination—neglect—findings of fact—sufficiency of evidence—In a proceeding to terminate a father's parental rights in his son based on neglect, competent evidence supported the trial court's findings of fact regarding the father's failure to voluntarily contribute to his son's care from his wages and his violation of the conditions of his probation by incurring new criminal charges, but the evidence contradicted the trial court's finding that the father did not enroll in a domestic violence intervention program. **In re K.N., 274.**

Grounds for termination—neglect—sufficiency of findings—The trial court's findings of fact were insufficient to support its termination of a father's parental rights in his son on the ground of neglect where the trial court's only factual finding directly relating to the father's ability to care for his son concerned the father's incarceration. Incarceration, standing alone, cannot support termination on the ground of neglect without an analysis of the relevant facts and circumstances, which the trial court did not do. Other findings regarding the adequacy of the father's participation in different aspects of his case plan were not fleshed out enough to support a conclusion that neglect was likely to recur if the minor were returned to the father's care. **In re K.N., 274.**

Grounds for termination—willful failure to make reasonable progress—nexus between court-approved plan and conditions which led to removal— The trial court's unchallenged findings of fact were sufficient to terminate a mother's

parental rights in her daughter on the grounds that she willfully left her daughter in foster care for more than twelve months without making reasonable progress to correct the conditions which led to the child's removal from her care, and were based on clear, cogent, and convincing evidence that the mother failed to maintain contact with the department of social services while her daughter was in its custody or to participate in any aspect of the court-ordered case plan. Despite the mother's argument that the conditions she failed to correct were not those which directly led to her daughter's removal, there existed a sufficient nexus between the components of the case plan and the overall conditions which led to the daughter's removal from the mother's care. **In re C.J., 260.**

Reunification efforts—cessation—adequacy of progress—best interests of child—The trial court did not abuse its discretion in determining that ceasing reunification efforts was in the best interests of respondent-mother's children where the evidence supported the trial court's findings that she made only "some progress" on her parenting skills, struggled with and was uncooperative in parent coaching sessions, and could not safely parent her children. **In re J.H., 264.**

SCHEDULE FOR HEARING APPEALS DURING 2020

NORTH CAROLINA SUPREME COURT

Appeals will be called for hearing on the following dates, which are subject to change.

January 6, 7, 8
February 3, 4
March 9, 10, 11, 12
April 6, 7, 20
May 4, 5, 6, 7
August 31
September 1, 2, 3
October 12, 13, 14, 15

IN RE C.J.

[373 N.C. 260 (2020)]

IN THE MATTER OF C.J.

No. 159A19

Filed 24 January 2020

Termination of Parental Rights—grounds for termination—willful failure to make reasonable progress—nexus between court-approved plan and conditions which led to removal

The trial court's unchallenged findings of fact were sufficient to terminate a mother's parental rights in her daughter on the grounds that she willfully left her daughter in foster care for more than twelve months without making reasonable progress to correct the conditions which led to the child's removal from her care, and were based on clear, cogent, and convincing evidence that the mother failed to maintain contact with the department of social services while her daughter was in its custody or to participate in any aspect of the court-ordered case plan. Despite the mother's argument that the conditions she failed to correct were not those which directly led to her daughter's removal, there existed a sufficient nexus between the components of the case plan and the overall conditions which led to the daughter's removal from the mother's care.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 14 January 2019 by Judge Sarah C. Seaton in District Court, Onslow County. This matter was calendared in the Supreme Court on 17 January 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Richard Penley for petitioner-appellee Onslow County Department of Social Services.

Michelle FormyDuval Lynch, GAL Appellate Counsel, for appellee Guardian ad Litem.

Parent Defender Wendy C. Sotolongo, by Assistant Parent Defender J. Lee Gilliam, for respondent-appellant mother.

BEASLEY, Chief Justice.

Respondent-mother appeals from an order entered by the trial court terminating her parental rights to her daughter, Chloe.[1] After careful consideration of respondent-mother's challenges to the trial court's conclusion that grounds exist to terminate her parental rights to Chloe, we affirm the trial court's order.

On 21 October 2014, the Onslow County Department of Social Services (DSS) obtained nonsecure custody of Chloe and filed a petition alleging she was a neglected and dependent juvenile. DSS alleged respondent-mother had been arrested in Georgia and extradited to Mississippi to face charges involving drug trafficking and stolen weapons. Respondent-mother's boyfriend had taken Chloe from her school in Georgia and moved with her to Jacksonville, North Carolina. The boyfriend was subsequently arrested on charges from Georgia, and Chloe was placed with his relatives. DSS deemed the placement inappropriate and learned that a Georgia department of social services had an open case involving respondent-mother and her alleged use of Chloe to obtain prescription medication. Chloe's father was incarcerated in Mississippi on a drug-related conviction and had a projected release date of 25 January 2016.[2]

After a hearing on 14 January 2015, the trial court entered an adjudication and disposition order on 24 April 2015, which it amended by order entered 16 September 2015. The court concluded Chloe was a dependent juvenile and continued custody of Chloe with DSS. The court ordered respondent-mother to participate in therapeutic intervention, including diagnostic assessment and testing, and follow all recommendations; to complete a substance abuse assessment and follow all recommendations; to complete drug screens as requested by DSS; to obtain and maintain verifiable employment; to obtain and maintain stable housing suitable for Chloe; and to maintain communication with DSS. The court also granted respondent-mother supervised visitation with Chloe for one hour every other week.

By order entered 15 June 2015, the trial court set the primary permanent plan for Chloe as reunification and the secondary plan as custody with a court-approved caretaker. On 5 December 2016 the court changed the permanent plan to guardianship, with a secondary concurrent plan

---

1. We refer to the minor child throughout this opinion as "Chloe," which is a pseudonym used to protect the identity of the child and for ease of reading.

2. Chloe's father subsequently died on 19 August 2017 and was not a party to the termination of parental rights proceeding.

of reunification, after finding that respondent-mother remained in Mississippi and had not provided DSS or the court with any evidence that she had participated in her case plan. Over the next several months, respondent-mother continued to fail to show progress toward meeting the goals of her case plan. The court ordered DSS to cease reunification efforts on 3 January 2017, and, by order entered 1 June 2018, the trial court set the primary permanent plan for Chloe as adoption and the secondary plan as guardianship.

DSS filed a petition to terminate respondent-mother's parental rights on 29 August 2018, alleging grounds of neglect, willfully leaving Chloe in foster care for more than twelve months without making reasonable progress to correct the conditions that led to her removal, willfully failing to pay a reasonable portion of the cost of care for Chloe during her placement in DHHS custody, dependency, and abandonment. *See* N.C.G.S. § 7B-1111(a)(1)–(3), (6), (7) (2017). After a hearing on 13 December 2018, the trial court entered an order terminating respondent-mother's parental rights to Chloe on 14 January 2019. The trial court found and concluded respondent-mother's parental rights were subject to termination based on the grounds of neglect, willfully leaving Chloe in foster care for more than twelve months without making reasonable progress to correct the conditions that led to her removal, and abandonment. The trial court further concluded termination of respondent-mother's parental rights was in Chloe's best interests. Respondent-mother filed timely notice of appeal to this Court from the trial court's order.

Respondent-mother first challenges four of the trial court's findings of fact as unsupported by clear, cogent, and convincing evidence. However, the challenged findings are not necessary to support the trial court's conclusion that respondent-mother willfully left Chloe in foster care for more than twelve months without making reasonable progress to correct the conditions that led to her removal, and they need not be reviewed on appeal. *See In re T.N.H.*, 831 S.E.2d 54, 58–59 (2019) ("[W]e review only those findings necessary to support the trial court's determination that grounds existed to terminate respondent's parental rights." (citing *In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982))).

Respondent-mother also argues the trial court erred in concluding she willfully left Chloe in foster care for more than twelve months without making reasonable progress to correct the conditions that led to her removal, because the conditions relied upon by the court to support this conclusion did not directly "lead" to Chloe's removal. Respondent-mother contends the only condition that directly led to Chloe's removal

was her potential lengthy incarceration in Mississippi, which she claims to have remedied. This Court has recently rejected a similar argument, holding a trial court's conclusion on this ground is supported where there exists a "nexus between the components of the court-approved case plan with which respondent-mother failed to comply and the 'conditions which led to [the juvenile's] removal' from the parental home." *In re B.O.A.*, 831 S.E.2d 305, 314 (2019).

In its initial adjudication and dispositional order, the trial court found Chloe was removed because respondent had left her in the care of her boyfriend after she was arrested and extradited to Mississippi to face criminal charges involving drug-trafficking and stolen weapons. At the time of Chloe's removal, a Georgia department of social services had an open case involving allegations that respondent-mother had used Chloe to obtain prescription medication. The court further found respondent-mother had a history with Child Protective Services in Mississippi involving allegations of inappropriate care, sexual abuse of a child by a caretaker or family friend, exposure of a child to illegal substances, and inappropriate discipline. Respondent-mother's demeanor at a hearing in this case led the court to be concerned that she may have been under the influence when she testified and may have been suffering from a mental health condition. These findings establish the required nexus between the components of respondent-mother's court-approved case plan and the overall conditions that led to Chloe's removal.

In its order terminating respondent-mother's parental rights, the trial court found respondent-mother failed to address any component of her court-ordered case plan and had not visited with Chloe since January 2015. These findings are supported by clear, cogent and convincing evidence that respondent-mother failed to maintain contact with DSS while Chloe was in the department's custody or to participate in court-ordered visitation, to verifiably participate in substance abuse assessment or drug screenings, or to maintain housing and employment stability. The trial court's findings fully support its conclusion that grounds exist to terminate respondent-mother's parental rights to Chloe under N.C.G.S. § 7B-1111(a)(2) because she willfully left Chloe in foster care for more than twelve months without making reasonable progress to correct the conditions that led to Chloe's removal from her care. *See In re B.O.A.*, 831 S.E.2d at 314–16.

The trial court's conclusion on this ground "is sufficient in and of itself to support termination of [respondent-mother's] parental rights[,]" *In re T.N.H.*, 831 S.E.2d at 62, and we need not address her arguments challenging the remaining grounds. Respondent-mother does not

challenge the trial court's conclusion that termination of her parental rights is in Chloe's best interests. Accordingly, we affirm the trial court's order terminating respondent-mother's parental rights to Chloe.

AFFIRMED.

IN THE MATTER OF J.H., Z.R., A.R., D.R.

No. 172A19

Filed 24 January 2020

1. Termination of Parental Rights—reunification efforts—cessation—adequacy of progress—best interests of child

The trial court did not abuse its discretion in determining that ceasing reunification efforts was in the best interests of respondent-mother's children where the evidence supported the trial court's findings that she made only "some progress" on her parenting skills, struggled with and was uncooperative in parent coaching sessions, and could not safely parent her children.

2. Termination of Parental Rights—best interests of child—likelihood of adoption—developmental challenges

The Supreme Court rejected respondent-mother's argument that her children were unlikely to be adopted due to their serious developmental challenges and that the trial court therefore abused its discretion by terminating her parental rights. The evidence and findings supported the trial court's conclusions that the children had a high likelihood of adoption by specific prospective adoptive parents.

Consolidated appeal pursuant to N.C.G.S. § 7B-1001(a1) and on writ of certiorari pursuant to N.C.G.S. § 7A-32(b) from orders entered on 26 February 2018 and 6 February 2019 by Judge Denise S. Hartsfield, in District Court, Forsyth County. This matter was calendared in the Supreme Court on 17 January 2020 but was determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Theresa A. Boucher, Assistant County Attorney, for petitioner-appellee Forsyth County Department of Social Services.

IN RE J.H.

[373 N.C. 264 (2020)]

Parker Poe Adams & Bernstein LLP, by Brandon Duckworth, for appellee Guardian ad Litem.

Sydney Batch for respondent-appellant mother.

EARLS, Justice.

Respondent appeals from the trial court's 26 February 2018 permanency planning order and from its 6 February 2019 order terminating her parental rights to Jared, Zendaya, Aaron, and Devon.[1] We affirm.

Background

Respondent is the mother of nine children. Four of her older children were adjudicated abused or neglected and she relinquished her parental rights with regard to those children in 2008. Over the last twenty years, respondent and her children have been the subjects of over forty Child Protective Services reports.

More recently, the Forsyth County Department of Social Services (DSS) received a report on or about 21 October 2016 that respondent was using inappropriate discipline by punching her sons Jared (age 9 at the time) and Devon (age 8 at the time). Two reports were made to DSS on or about 10 November 2016. The first concerned an injury to Devon's top lip that required medical attention. The second report indicated that respondent's daughter Zendaya (age 4 at the time) had been sexually abused by Zendaya's adult brother, I.H., one of respondent's older sons. The sexual abuse occurred after respondent was evicted from her home and had moved into I.H.'s home. Prior to moving in with I.H., respondent was aware of the dangers I.H. posed to her children. Specifically, DSS advised respondent multiple times that I.H. posed a risk of harm to the younger children and, earlier in 2016, I.H. had been named as a sexual offender in a report involving the sexual abuse of respondent's son, Jared. Jared, Zendaya, Aaron, and Devon were removed from the care, custody, and control of respondent on 11 November 2016.

On 3 April 2017, the trial court adjudicated Jared, Zendaya, Aaron, and Devon to be abused and neglected. In its order, the trial court required respondent to take a number of steps in order to reunify with her children, including:

1. Pseudonyms are used to protect the identity of the juveniles and for ease of reading.

a) Complete a mental health assessment and follow all the recommendations of her assessment.

b) Maintain employment to demonstrate her ability to provide for herself and her children for a minimum of six months.

c) Maintain appropriate and safe housing for herself and her children for a minimum of six months.

d) Participate in parent coaching to change and develop appropriate ways to parent her children and implement those skills during visits. [Respondent] is to follow the recommendations of the parent coach.

e) That [respondent] signs the necessary release forms to allow FCDSS and the Courts to monitor her progress.

The trial court held a review hearing on 31 May 2017, followed by a permanency planning hearing on 1 September 2017. Following the latter hearing, the court entered an order on 8 December 2017 finding that respondent was thus far "in compliance with her court plan and has made progress," but that "[respondent] can not safely parent her children. The Court continues to have concerns about the safety of [respondent's] new baby in her home."

The court held another permanency planning hearing on 24 January 2018. In its subsequent written order filed 26 February 2018, the court found that respondent had complied with some of the terms of her case plan while failing to comply with others. The court found that "[respondent] has made some progress but still demonstrates that she cannot safely parent her children" and that "the issues that brought the children into care are still present." After noting that DSS had filed petitions to terminate respondent's rights on 5 January 2018, the court ordered the cessation of reunification efforts and visitation between respondent and her children, ordered that the permanent plan for Zendaya, Aaron, and Devon be reunification with the father with a secondary plan of adoption, and ordered that the permanent plan for Jared be reunification with the father with a secondary plan of adoption. On 23 March 2018, respondent filed a "NOTICE TO PRESERVE RIGHT OF APPEAL" of the 26 February 2018 order ceasing reunification efforts.

The trial court held a termination of parental rights hearing on 12 September 2018. At the conclusion of the hearing, the trial court terminated respondent's parental rights as to these four children. The termination of parental rights order was filed on 6 February 2019. In

its order, the court found that respondent did not successfully complete compliance with the prior orders of the courts, including, *inter alia*, by failing to demonstrate safe parenting skills during the 22 months her children were in the custody of DSS and failing to successfully complete parenting classes. The court concluded that respondent had abused and neglected Jared, Zendaya, Aaron, and Devon and that grounds existed to terminate respondent's parental rights under N.C.G.S. § 7B-1111(a)(1). Furthermore, the court concluded that respondent "failed to demonstrate . . . that she can safely maintain her children in a safe home," that return of the children to respondent "would result in a strong likelihood of repeated abuse or neglect of the children," and that it is in the best interests of the children to terminate respondent's parental rights. On 28 February 2019, respondent filed a notice of appeal.

Cessation of Reunification

[1] Respondent first contends that the trial court erred in its 26 February 2018 permanency planning order ceasing reunification efforts and excluding reunification with respondent as a permanent plan (the cessation order).[2] We hold that the trial court's findings are supported by competent evidence and that its permanency planning order was not an abuse of discretion.

"Our review of [a] cease reunification order . . . 'is limited to whether there is competent evidence in the record to support the findings [of fact] and whether the findings support the conclusions of law.' " *In re L.M.T.*, 367 N.C. 165, 168, 752 S.E.2d 453, 455 (2013) (second alteration in original) (quoting *In re P.O.*, 207 N.C. App. 35, 41, 698 S.E.2d 525, 530 (2010)). "The trial court's findings of fact are conclusive on appeal if supported by any competent evidence." *Id.* (citing *In re P.O.*, 207 N.C. App. at 41, 698 S.E.2d at 530). Further, we agree with the Court of Appeals that we review an order ceasing reunification "to determine . . . whether the trial court abused its discretion with respect to disposition." *See In re N.G.*, 186 N.C. App. 1, 10, 650 S.E.2d 45, 51 (2007) (quoting *In re C.M.*,

2. Respondent filed her appeal of the termination of her parental rights in this Court but simultaneously filed her appeal of the cessation order in the Court of Appeals. On 17 June 2019, DSS filed a motion at the Court of Appeals to dismiss respondent's appeal of the cessation order based upon potential procedural issues with respondent's appeal. Respondent filed a response, arguing that DSS's contentions were without merit. On 14 November 2019, this Court "acting on its own motion, in order to resolve expeditiously all of the issues relating to these children, . . . issue[d] a writ of certiorari, . . . to consolidate both matters for review in this Court, as contemplated by N.C.G.S. § 7B-1001(a1)(2)." We decline to address those procedural issues here given our determination that, in any event, the trial court did not err in its cessation order.

183 N.C. App. 207, 213, 644 S.E.2d 588, 594 (2007)), *aff'd per curiam*, 362 N.C. 229, 657 S.E.2d 355 (2008). "At the disposition stage, the trial court solely considers the best interests of the child. Nonetheless, facts found by the trial court are binding absent a showing of an abuse of discretion." *Id.* at 10, 650 S.E.2d at 51 (quoting *In re Pittman*, 149 N.C. App. 756, 766, 561 S.E.2d 560, 567 (2002). "An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *Id.* at 10–11, 650 S.E.2d at 51 (quoting *In re Robinson*, 151 N.C. App. 733, 737, 567 S.E.2d 227, 229 (2002)).

At a permanency planning hearing, "[r]eunification shall be a primary or secondary plan unless," *inter alia*, "the court makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety." N.C.G.S. § 7B-906.2(b) (2019). Additionally, the court must make findings "which shall demonstrate the degree of success or failure toward reunification," including:

> (1) Whether the parent is making adequate progress within a reasonable period of time under the plan.
>
> (2) Whether the parent is actively participating in or cooperating with the plan, the department, and the guardian ad litem for the juvenile.
>
> (3) Whether the parent remains available to the court, the department, and the guardian ad litem for the juvenile.
>
> (4) Whether the parent is acting in a manner inconsistent with the health or safety of the juvenile.

Id. § 7B-906.2(d). This Court has stated in the context of orders ceasing reunification efforts that "[t]he trial court's written findings must address the statute's concerns, but need not quote its exact language." *In re L.M.T.*, 367 N.C. 165, 168, 752 S.E.2d 453, 455 (2013).

Here the trial court found that respondent completed a mental health assessment, signed the requisite release forms, and maintained, at the time of the hearing, an appropriate home. On the other hand, the trial court found that respondent was unemployed and was not in compliance with the requirement that she maintain employment and demonstrate her ability to provide for herself and her children for a period of six months. Additionally, the trial court found that while respondent participated in parent coaching, the parenting coach "reported that parenting coaching should be discontinued" due to respondent's slow progress and struggles with parenting her children. The court further found that "[respondent] has made some progress but still demonstrates that she

cannot safely parent her children" and that "the issues that brought the children into care are still present." The Court determined that return of the children "to the home of their parents would be contrary to the welfare of the juveniles at this time."

Respondent contends that, with respect to her parenting skills, the trial court's finding that she only made "some progress" was unsupported by evidence. Yet, the weekly reports from the parent coaching sessions catalogue how respondent, rather than listening to the coach and implementing suggested strategies, became argumentative, failed to follow simple instructions, and would threaten to leave the sessions. On one occasion, respondent "pin[ned] [Aaron] to the ground using her weight to restrain him," and when asked by the parenting coach not to lie on the child because doing so could cause injury, began yelling at the coach and then left the session. Respondent brought food for the children to which they were allergic, stating that she was "aware of the allergies but 'they only cause diarrhea.' " Additionally, the parenting coach reported that she "asked [respondent] weekly for the last two months to bring diapers for [Devon] and every week she has a different reason for not bringing the diapers. I ask her again if she remembered to bring a diaper. She did not." The parenting coach ultimately reported:

> I'm recommending coaching services be discontinued for [respondent]. She has been consistent with visits and appears to enjoy spending time with her children when they are compliant. However, she is not making the effort or showing improvement when parenting is difficult. She has four children with severe trauma and/or developmental disabilities. Parenting will be difficult, challenging and stressful. . . . Both [Aaron] and [Devon] can be defiant, difficult to communicate with and require consistent and constant monitoring. [Respondent] avoids engaging the children when they [ ] need the additional attention. When I try to redirect her, she is argumentative o[r] simply ignores my suggestions. This behavior/conflict is not productive and sets a poor example for the children.

Similarly, the parenting coach reported that she explained to respondent:

> I also wanted her to know it is my recommendation that coaching services be terminated because she is not making progress and some of the reasons I believe this is so, specifically she feels there is no need for services or room for growth. In addition, I believe she sees coaching as

> punitive and is therefore defensive when I offer suggestions or recommendations. I have seen the children, specifically [Jared], negatively impacted by her response to me and this does not benefit her, them or the process.

We conclude that there was ample evidentiary support for the trial court's finding that respondent only made "some progress" with respect to her parenting skills. Moreover, we conclude that, given the trial court's extensive findings about respondent's degree of progress and the underlying evidence, the trial court did not abuse its discretion in determining that ceasing reunification was in the best interests of the children.

Termination of Parental Rights

[2] A termination of parental rights proceeding involves two stages: an adjudicatory stage and a dispositional stage. *See In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984). During the adjudicatory stage, the party petitioning for the termination of parental rights must show the existence of one or more of the statutory grounds for termination of parental rights by clear, cogent, and convincing evidence. N.C.G.S. § 7B-1109 (2017). In this appeal, respondent does not challenge the trial court's findings that these four children are abused or neglected and that statutory grounds exist to terminate her parental rights.

Having found grounds to terminate respondent's parental rights, the trial court then moved to the dispositional stage, where it examined whether the termination of parental rights is in the best interests of the children. *See* N.C.G.S. § 7B-1110. We review the trial court's decision to terminate parental rights at the disposition stage for abuse of discretion. *In re D.L.W.*, 368 N.C. 835, 842, 788 S.E.2d 162, 167 (2016) (citations omitted). "[A]buse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re T.L.H.*, 368 N.C. 101, 107, 772 S.E.2d 451, 455 (2015) (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)). We find no such abuse of discretion in this case.

In determining the best interests of a child during the dispositional phase of the termination of parental rights hearing, the trial court must make relevant findings concerning: (1) the age of the juvenile, (2) the likelihood of adoption, (3) whether termination will aid in the accomplishment of the permanent plan, (4) the bond between juvenile and the parent, (5) the quality of the relationship between the juvenile and the proposed permanent placement, and (6) any relevant consideration. N.C.G.S. § 7B-1110(a). The trial court made findings related to each issue enumerated by statute, and individually determined that Jared,

Zendaya, Aaron, and Devon each had a "high probability" of adoption. Respondent argues that the trial court erred in terminating her parental rights solely because she believes it is unlikely the children would be adopted due to their numerous serious developmental challenges. However, the record shows that the trial court thoroughly considered the children's developmental challenges and their likelihood of adoption based on their current placement and potential future adoptive parents.

Jared

The trial court found that Jared has "special mental health and educational needs," has a learning disability, and has been diagnosed with Post-Traumatic Stress Disorder (PTSD) and ADHD for which he is prescribed medication. In determining Jared's probability of adoption the trial court found:

> [Jared] is 11 years old. He is placed in the home of his father and stepmother. He is receiving good and safe care in this home. There is a high likelihood that a stepparent adoption can occur for Jared so that he will have an intact two-parent home.

At the time of the termination hearing Jared was in the care of his biological father, his step-mother, and his sixteen year old sister. The evidence presented at the hearing showed that Jared is bonded with his biological father and that if he remains with his father, there is a strong likelihood of stepparent adoption. Thus, there is evidence in the record to support the trial court's finding that Jared was likely to be adopted even though he has a learning disability and other challenges.

Devon

The trial court found that Devon has "very special needs." At ten years old, he has severe intellectual disabilities, is not toilet trained, and is non-verbal. Devon is learning sign language in order to communicate his needs. Further, the trial court found that Devon has received an Innovations Waiver, which will provide him with necessary services for the rest of his life. In considering the probability that Devon would be adopted, the trial court found:

> There is a high likelihood of [a]doption and there is an identified prospective adoptive home for [Devon] but he is not living in that home at this time. The maternal grandmother has expressed interest in adopting [Devon] and all

> of his siblings. The Court is unable to determine the quality of that relationship.
>
> . . . .
>
> [Devon] is currently placed in a specialized facility . . . .. [Devon] is doing well in this facility and he has learned to swim. He is also learning to ride a bike. [Devon] is learning to have positive peer relationships and is making improvements in this area.

The trial court heard testimony that Devon was thriving in his current placement. There was evidence to support the trial court's conclusion that despite Devon's developmental challenges his probability of adoption was high because there is a prospective adoptive home for him in addition to the desire of his maternal grandmother to adopt him.

Aaron

The trial court found that Aaron has "special needs" and that he has been diagnosed with mild intellectual disabilities. Aaron has an Individual Education Plan and is diagnosed with ADHD for which he receives medication. In determining Aaron's probability of adoption the trial court found:

> [Aaron] is 6 years old. The likelihood for Adoption is very likely.
>
> . . . .
>
> [Aaron] is placed in a prospective adoptive home and he has a very good relationship with his prospective adoptive parent. [Aaron] looks to her for comfort and guidance. He is thriving in this home. His communication skills have improved greatly. In this home he has a same-age sibling and the two children have a close relationship.

At the termination hearing, Ms. Tonya Britton, a foster care social worker with DSS, summarized Aaron's progress with his prospective adoptive parent:

> Q. What is the quality of relationship between [Aaron] and his prospective adoptive parent?
>
> A. He's very bonded to her. He's called her Mom. He also has a foster brother in the home as well that he's very, very close to. They are the same age.

> Q. Does he look to her for comfort and guidance?
>
> A. Yes, he does.
>
> Q. When you have visited him in that home, does he appear to be at home there?
>
> A. Yes. . . . He has thrived in that home to the point that he has been caught up, as far as some of the educational things that he was behind in. He's communicating a whole lot better now. He could have a conversation with you, compared to when he didn't used to talk at all, or you couldn't understand what he was saying.

The testimony presented at trial supported the court's finding that even in light of his special needs, Aaron was likely to be adopted.

Zendaya

The trial court found that Zendaya has "special needs." Further, the trial court found that Zendaya was sexually molested by her brother I.H. and needs ongoing support and therapy. Zendaya has been diagnosed with PTSD but is making significant progress since her removal from her mother's home. With regard to the probability of Zendaya's adoption the trial court found:

> [Zendaya] is 5 years old. The likelihood of Adoption for [Zendaya] is very high. There are multiple families interested in adopting her.
>
> . . . .
>
> [Zendaya] is in kindergarten and is making educational progress.
>
> [Zendaya] has a safe and nurturing relationship with her current caregivers, who are prospective adoptive parents. [Zendaya] looks to them for comfort and guidance. She is involved in community and church activities with her prospective adoptive [parents]. She is thriving in this home.

The evidence at trial established that Zendaya was thriving in her current placement, even calling her prospective adoptive parents "Daddy, and Mom." Zendaya has multiple potential adoptive families and there was testimony that the prospect of her being adopted was "[v]ery, very, very, very likely." The trial court's finding that Zendaya was likely to be adopted despite her developmental challenges was supported by clear, cogent and convincing evidence in the record.

Respondent argues that children with behavioral challenges and/or developmental delays, as well as children in foster care, are difficult to place with adoptive families. Such general truths cannot overcome the particularized evidence in this case supporting the trial court's factual findings that each of these children had a high probability of being adopted. Notably, as relevant to the ultimate conclusion that termination of respondent's parental rights is in the children's best interests, there was also testimony that Jared, Devon, Aaron and Zendaya are thriving and showing great improvement developmentally in their current placements. This evidence suggests they are benefitting from not being in the custody and control of respondent. The trial court did not abuse its discretion in concluding that it was in the children's best interests to terminate respondent's parental rights.

AFFIRMED.

IN THE MATTER OF K.N.

No. 110A19

Filed 24 January 2020

1. Termination of Parental Rights—grounds for termination—neglect—findings of fact—sufficiency of evidence

In a proceeding to terminate a father's parental rights in his son based on neglect, competent evidence supported the trial court's findings of fact regarding the father's failure to voluntarily contribute to his son's care from his wages and his violation of the conditions of his probation by incurring new criminal charges, but the evidence contradicted the trial court's finding that the father did not enroll in a domestic violence intervention program.

2. Termination of Parental Rights—grounds for termination—neglect—sufficiency of findings

The trial court's findings of fact were insufficient to support its termination of a father's parental rights in his son on the ground of neglect where the trial court's only factual finding directly relating to the father's ability to care for his son concerned the father's incarceration. Incarceration, standing alone, cannot support termination on the ground of neglect without an analysis of the relevant facts and circumstances, which the trial court did not do. Other

findings regarding the adequacy of the father's participation in different aspects of his case plan were not fleshed out enough to support a conclusion that neglect was likely to recur if the minor were returned to the father's care.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 7 January 2019 by Judge H. Thomas Jarrell in District Court, Guilford County. This matter was calendared for argument in the Supreme Court on 17 January 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Mercedes O. Chut for petitioner-appellee Guilford County Department of Health and Human Services.

K&L Gates, LLP, by Erica Hicks for Guardian ad Litem.

Jeffrey William Gillette for respondent-appellant father.

DAVIS, Justice.

In this case, we consider whether the trial court erred by terminating the parental rights of respondent-father (respondent) to K.N. ("Keith")[1] on the basis of neglect. Because we conclude that the findings in the trial court's order are insufficient to support a determination that respondent had neglected Keith, we vacate the termination order and remand this case to the District Court, Guilford County, for further proceedings.

Factual and Procedural Background

Respondent and "Maria"[2] are the biological parents of Keith, who was born on 17 September 2016. On or about 26 December 2016, the Guilford County Department of Health and Human Services (DHHS) received a report that Keith's parents were involved in a verbal dispute during which respondent claimed Maria was attempting to suffocate the child. Maria accused respondent of being intoxicated and holding onto Keith "too tightly" while they argued. Both Maria and Keith were taken to the hospital, but no injuries were discovered to either of them. Maria reported that respondent's relatives had "jumped" her the previous

1. Pseudonyms are used throughout this opinion to protect the identity of the juvenile.

2. Keith's mother is not a party to this appeal.

night and also disclosed several incidents of domestic violence between her and respondent.

On 10 January 2017, a safety plan with DHHS was updated and, as part of that plan, Maria agreed to keep Keith in a safe environment. However, on or about 29 January 2017, she violated the safety plan by returning to her mother's residence, which DHHS considered unsafe due to prior involvement with Child Protective Services and a history of domestic violence between Maria, her mother, and her brother. On 6 February 2017, DHHS obtained nonsecure custody of Keith and filed a juvenile petition in District Court, Guilford County, alleging that Keith was a neglected and dependent juvenile.

On 28 August 2017, the trial court entered an order adjudicating Keith to be a neglected and dependent juvenile. Pursuant to a case plan entered into with DHHS, respondent was ordered to participate in an anger management evaluation and follow all recommendations. He was allowed weekly visitations with Keith. Respondent was also ordered to comply with his case plan, which required him, among other things, to (1) secure and maintain appropriate housing suitable for Keith and to notify DHHS accordingly; (2) provide verification of his Supplemental Security Income (SSI) benefits; (3) participate in and successfully complete the Parent Assessment Training and Education (PATE) program; (4) submit to a substance abuse assessment and follow any recommendations; (5) participate in the Domestic Violence Intervention Program (DVIP); (6) notify DHHS of any incidents of domestic violence; (7) comply with the terms of his probation; and (8) refrain from incurring any new criminal charges. Keith remained in DHHS custody.

On 14 November 2017, the trial court entered a permanency planning hearing order. The court found that respondent was living in a boarding house and was on probation for thirty months, effective January 2017. He had completed a parenting evaluation but refused to engage in individual counseling—despite having received a recommendation to do so—due to the cost of the sessions. He had successfully completed the Treatment Accountability for Safer Communities (TASC) substance abuse program.

The trial court further found that respondent had indicated that he would take part in anger management classes, but then refused to participate in the DVIP program because "he had not been . . . charged as an abuser." As a result of his failure to "actively engage in his case plan," the court determined that respondent was "acting in a manner inconsistent with the health and safety of the juvenile." The trial court ordered that

the permanent plan be reunification with a concurrent secondary plan of adoption.

The trial court entered a subsequent permanency planning hearing order on 5 February 2018. The court found that respondent was living in a location unsuitable for Keith and was continuing to refuse to participate in individual parenting counseling due to cost. Although he completed anger management classes, he had attended only one DVIP class and remained uninterested in the program. The trial court changed the primary permanent plan to adoption with a concurrent secondary permanent plan of reunification. DHHS was ordered to proceed with filing a petition for termination of respondent's parental rights within sixty days.

On 15 March 2018, DHHS filed a petition to terminate respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(1)–(2).[3] The termination hearing was conducted on 27 and 28 November 2018. On 7 January 2019, the trial court entered an order finding that grounds existed to terminate respondent's parental rights on the basis that respondent had neglected Keith and that such neglect was likely to recur if the juvenile was returned to respondent. *See* N.C.G.S. § 7B-1111(a)(1).[4] The trial court also determined that the termination of respondent's parental rights was in the best interests of Keith. *See* N.C.G.S. § 7B-1110(a). Respondent gave notice of appeal to this Court pursuant to N.C.G.S. § 7B-1001(a1)(1).

Analysis

On appeal, respondent contends that (1) the trial court made various findings of fact that were not supported by the evidence; and (2) the court's findings were insufficient to support its conclusion that Keith was neglected pursuant to N.C.G.S. § 7B-1111(a)(1). Our Juvenile Code provides for a two-step process for the termination of parental rights—an adjudicatory stage and a dispositional stage. N.C.G.S. §§ 7B-1109, -1110 (2017). During the adjudicatory stage, the petitioner bears the burden of proving by "clear, cogent, and convincing evidence" the existence of one or more grounds for termination pursuant to subsection 7B-1111(a) of the General Statutes of North Carolina. N.C.G.S. § 7B-1109(e), (f) (2017).

---

3. DHHS also sought to terminate Maria's parental rights pursuant to N.C.G.S. § 7B-1111(a)(1), (2), and (9).

4. The trial court's order also terminated Maria's parental rights on the basis of neglect and additionally found that grounds existed to terminate her parental rights pursuant to N.C.G.S. § 7B-1111(a)(2) and (9).

If a trial court finds that a ground exists for termination, it then proceeds to the dispositional stage at which it must "determine whether terminating the parent's rights is in the juvenile's best interest." N.C.G.S. § 7B-1110(a).

We review a trial court's adjudicatory findings under N.C.G.S. § 7B-1109 "to determine whether [they] are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984). "The trial court's conclusions of law are reviewable de novo on appeal." *In re C.B.C.*, 832 S.E.2d 692, 695 (N.C. 2019) (citing *In re S.N.*, 194 N.C. App. 142, 146, 669 S.E.2d 55, 59 (2008), *aff'd per curiam*, 363 N.C. 368, 677 S.E.2d 455 (2009)).

In its termination order, the trial court made the following pertinent findings of fact in support of its conclusion that grounds existed to terminate respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(1):

> 12. [Respondent] entered into a case plan on April 3, 2017. The components of the plan, and his progress therewith, are as follows:
>
> A. Housing/Environment/Basic Physical Needs: The father was to secure and maintain appropriate, independent housing suitable for his child. Once the father secured housing he was to provide DHHS with a copy of his lease with his name on it within 72 hours. He was to cooperate with announced and unannounced visits to his home. [Respondent] did ultimately obtain suitable housing, after a period of residing in boarding houses. However, he is currently incarcerated at the Guilford County Department of Corrections, awaiting trial for charges of DUI, Assault with a Deadly Weapon on a Government Official, F[lee] ing to Elude Arrest, Unlawful Passing of an Emergency Vehicle, and Failure to stop at a Red Light. Although he has testified that he expects to make his $28,000.00 bond next week, the Court finds that it is uncertain when and if he will be released pending trial.
>
> B. Employment: The father was to provide DHHS with verification of his SSI benefits. [DHHS] did ultimately independently receive verification of [respondent's] benefits. At that time [DHHS] sought, and obtained, transfer of the juvenile's portion of those benefits from [Maria] (who had

been receiving them throughout the case) to [DHHS]. In addition to his SSI benefit, [respondent] works odd jobs and has just started a cleaning business. He has not provided financially for the juvenile, although the juvenile now does receive a $190.00 per month benefit from SSI.

C. Parenting Skills:

1) The father was to participate in a Parenting Psychological Evaluation and follow all recommendations. The father completed the Parenting Evaluation through Dr. Michael McColloch. Dr. McColloch recommended that [respondent] participate in individual counseling and continue to work his case plan in an effort to be reunified with his son. [Respondent] participated in individual therapy through Family Service[ ] of the Piedmont. In April of 2018 he was released from therapy with a determination that he had achieved his treatment goals.

2) The father was to participate in the PATE Parenting Classes or parenting classes through Family Service[ ] of the Piedmont until successfully completed and a certificate received. He was to visit with [Keith] once per week. [Respondent] completed the PATE Program on 10/03/17. He visited consistently with [Keith] and the visits were appropriate and went well, with no concerns to note.

3) The father was to contact Child Support Enforcement and enter into a voluntary child support agreement. [Respondent] reported that he receives SSI and cannot be pursued for Child Support.

D. Substance Abuse: The father was to submit to a substance abuse assessment and follow all recommendations. The father successfully completed the TASC Program. However, [respondent] submitted three drug screens which came back as "diluted," on June 29, 2018, July 6, 2018, and August 27, 2018. [DHHS] regards diluted samples as failed screens. He was asked thereafter to take another screen, which he delayed taking by 36 hours. That test was negative for illicit substances.

E. Domestic Violence: The father was to participate in the Domestic Violence Intervention Program through Family Service[ ] of the Piedmont and . . . follow all

> recommendations. The father was to notify DHHS of any incidents of domestic violence between himself and any intimate partner. Initially [respondent] indicated that he did not understand why he had to participate in a domestic violence class when he had not been . . . charged as an abuser. Subsequently [respondent] did complete anger management classes but did not enroll in the DVIP program. Albert Linder, his individual therapist, testified that some domestic violence issues were addressed in individual counseling.
>
> F. Probation: The father was to cooperate with the terms of his probation. The father was to resolve his pending criminal charges and not incur any new criminal charges. [Respondent] has violated his probation and his case plan by incurring new charges.
>
> 13. [DHHS] has failed to provide clear and convincing evidence that [respondent] has not made reasonable progress in his case plan.
>
> . . . .
>
> 15. The father and the mother both receive SSI income and are not required to pay child support. However, neither parent has provided any financial support for the juvenile since he came into the custody of [DHHS].
>
> 16. Grounds exist to terminate the parental rights of . . . [respondent] pursuant to N.C.G.S.[ ]§[ ]7B-1111(a)(1): The parents have neglected the juvenile within the meaning of N.C.G.S.[ ]§[ ]7B-101, and such neglect is likely to recur if the juvenile is returned to the respondent[ ].

[1] We first address respondent's argument that certain findings of fact by the trial court were not supported by competent evidence. Respondent challenges the last sentence in Finding of Fact 12(B), arguing that the trial court's finding that he "has not provided financially for the juvenile" contradicts the court's following statement that Keith receives $190.00 per month from respondent's SSI benefits. Respondent testified at the termination hearing that he received $885.00 per month in SSI benefits, a portion of which was paid directly to DHHS for the care of Keith. He also testified that in addition to receiving SSI benefits, he had started a cleaning business with his son and did "odd jobs" to earn income. Thus, while the trial court noted that Keith was receiving an allotment of SSI benefits

each month, it also found that respondent had not voluntarily contributed to the juvenile's care from the income he was earning through his business and odd jobs. Accordingly, we hold that the last sentence of Finding of Fact 12(B) is supported by the evidence.

Respondent also contends that Finding of Fact 12(E), which states that he "did not enroll in the DVIP program," was not supported by the evidence. We agree. Testimony from a social worker at the termination hearing, as well as other evidence in the record, reveals that respondent participated in and completed the DVIP program through Family Service of the Piedmont on 14 August 2018. Although the record suggests that respondent initially resisted participating in the program and did not acknowledge that he engaged in domestic violence, there is nothing in the record that contradicts the social worker's testimony that respondent participated in and completed the DVIP program. As such, we must disregard the trial court's finding that respondent did not enroll in the DVIP program.

Finally, respondent challenges the last sentence of Finding of Fact 12(F), claiming that there was no evidence that he violated the terms of his probation by incurring new criminal charges. Although respondent concedes that the initiation of new criminal charges against him constituted a breach of his DHHS case plan, we disagree that there is nothing in the record indicating that the institution of the charges actually violated the terms of his probation. At the termination hearing, the social worker testified—without objection—that respondent had violated the conditions of his probation by incurring the new criminal charges. As a result, we hold that the last sentence of Finding of Fact 12(F) is supported by evidence in the record.

[2] We next consider respondent's argument that the trial court's findings of fact are insufficient to support its conclusion that grounds exist to terminate his parental rights on the basis of neglect. Subsection 7B-1111(a) allows for the termination of parental rights if the trial court finds the parent has neglected his child to such an extent that the child fits the definition of a "neglected juvenile" under N.C.G.S. § 7B-101(15). N.C.G.S. § 7B-1111(a)(1). A neglected juvenile is statutorily defined, in pertinent part, as a juvenile "whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; . . . or who lives in an environment injurious to the juvenile's welfare." N.C.G.S. § 7B-101(15) (2017). Generally, "[t]ermination of parental rights based upon this statutory ground requires a showing of neglect at the time of the termination hearing." *In re D.L.W.*, 368 N.C. 835, 843, 788 S.E.2d 162, 167 (2016) (citing *In re Ballard*, 311 N.C. 708, 713–15, 319 S.E.2d

227, 231–32 (1984)). However, "if the child has been separated from the parent for a long period of time, there must be a showing of past neglect and a likelihood of future neglect by the parent." *Id.* at 843, 788 S.E.2d at 167. When determining whether future neglect is likely, the trial court must consider evidence of relevant circumstances or events that existed or occurred either before or after the prior adjudication of neglect. *In re Ballard*, 311 N.C. at 715, 319 S.E.2d at 232. "The determinative factors must be the best interests of the child and the fitness of the parent to care for the child *at the time of the termination proceeding*." *Id.* at 715, 319 S.E.2d at 232.

Thus, in light of Keith's prior adjudication as a neglected juvenile and his resulting removal from the home, we must evaluate whether there are sufficient findings of fact in the termination order to support the trial court's ultimate conclusion that there is a likelihood of future neglect by respondent. Respondent asserts that absent the unsupported findings of fact in the trial court's order, the order lacks a sufficient factual basis to support the trial court's finding of neglect. We agree.

The trial court's findings reflect that DHHS had "failed to provide clear and convincing evidence that [respondent] had not made reasonable progress on his case plan" and that respondent had complied with the provisions of his case plan dealing with housing, SSI benefits, and participation in and completion of a psychological assessment, parenting education, substance abuse treatment, and anger management classes. The trial court made very few findings of fact that directly relate to respondent's ability to care for Keith or the extent to which respondent's behavior affected Keith's welfare. *See In re N.D.A.*, 833 S.E.2d 768, 775 (N.C. 2019). The only factual finding that directly addresses respondent's ability to care for Keith is Finding of Fact 12(A), in which the trial court found that although respondent had secured suitable housing, he was incarcerated at the time of the proceeding and awaiting trial on a number of criminal charges. At the termination hearing, respondent testified that he anticipated paying his bond the following week, but the trial court found that "it is uncertain when and if he will be released pending trial."

A parent's incarceration may be relevant to the determination of whether parental rights should be terminated, but "[o]ur precedents are quite clear—and remain in full force—that '[i]ncarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision.' " *In re M.A.W.*, 370 N.C. 149, 153, 804 S.E.2d 513, 517 (2017) (quoting *In re P.L.P.*, 173 N.C. App. 1, 10, 618 S.E.2d 241, 247 (2005), *aff'd per curiam*, 360 N.C. 360, 625 S.E.2d 779 (2006)). Thus,

respondent's incarceration, by itself, cannot serve as clear, cogent, and convincing evidence of neglect. Instead, the extent to which a parent's incarceration or violation of the terms and conditions of probation support a finding of neglect depends upon an analysis of the relevant facts and circumstances, including the length of the parent's incarceration. The trial court's findings do not contain any such analysis.

DHHS contends that the trial court's findings regarding respondent's failure to fully address the domestic violence component of his case plan by continuing to engage in domestic violence and by being dilatory in addressing issues related to domestic violence, his failure to make efforts to cooperate with DHHS regarding his substance abuse issues, and his failure to contribute significant earnings from his employment all support its ultimate conclusion that neglect is likely to recur if Keith is returned to respondent's care. We do not find this argument persuasive in light of an analysis of the trial court's actual findings, which do not contain a considerable amount of the information upon which DHHS relies.

Finding of Fact 12(E) addressed concerns with respondent's involvement in incidents of domestic violence. Aside from the erroneous finding that respondent did not complete DVIP, this portion of the trial court's order does not establish that respondent failed to comply with the domestic violence-related portions of his case plan or engaged in continued acts of domestic violence against Maria or anyone else.

In Finding of Fact 12(D), the trial court addressed the substance abuse component of respondent's case plan. The court found that respondent had submitted three diluted drug screens in June, July, and August 2018 and that DHHS considered diluted samples as "failed screens." However, this finding—without greater explanation—is insufficient to support a determination as to the likelihood of future neglect. The trial court's findings state that respondent delayed taking another drug screen for thirty-six hours, but do not provide any further explanation concerning the extent to which the thirty-six-hour delay enabled him to ultimately provide a "clean" sample or even when the sample was requested and provided. In addition, the trial court's findings do not address the nature and extent of respondent's earlier substance abuse issues or whether the trial court, as compared to DHHS, deemed a "diluted" sample to be tantamount to a positive test result.

Finally, in Finding of Fact 12(B) and Finding of Fact 15, the trial court found that respondent had not provided financially for Keith since he came into DHHS custody. Yet, in Finding of Fact 15, the trial court also

determined that respondent received SSI benefits and was not required to pay child support. Absent further findings by the trial court regarding respondent's finances and ability to pay additional support beyond the portion of SSI benefits going to Keith's care, we are unable to say that these portions of the trial court's order supported a finding of neglect.

As a result, for these reasons, we conclude that the trial court's findings are insufficient to support the court's ultimate determination that respondent's parental rights were subject to termination on the basis of neglect. We acknowledge, however, that the trial court *could* have made additional findings of fact, based on other evidence in the record, that might have been sufficient to support a finding of a future likelihood of neglect, including: (1) respondent's long history of drug abuse; (2) respondent's extensive criminal record which consists of drug convictions and convictions for multiple violent crimes; (3) the effect of respondent's serious criminal charges pending at the time of the termination hearing, the absence of any clear indication of when he would be released from custody or if he would be able to make bond, and the ensuing effect on his future ability to care for Keith; (4) respondent's dilatory pace in completing the objectives of his case plan; (5) respondent's hostility toward the people responsible for managing certain programs in which he had refused to participate; and (6) the additional domestic violence incident involving respondent, Maria, and another woman during which respondent was cut with a knife. Moreover, as noted above, while the trial court stated in Finding of Fact 12(D) that respondent waited thirty-six hours to take a new drug test after providing three diluted samples, it appears from the record that the delay was actually *three days*, which could suggest an attempt on his part to manipulate the results of the drug test.

In *In re N.D.A.*, we recently addressed a similar scenario in which the trial court's adjudicatory findings were insufficient to support its conclusion that termination of the parent's rights was warranted, but the record contained additional evidence that could have potentially supported a conclusion that termination was appropriate. There, we vacated the trial court's termination order and remanded the case for further proceedings, including the entry of a new order containing findings of fact and conclusions of law addressing the issue of whether a ground for termination existed. *See In re N.D.A.*, 833 S.E.2d at 777.

We believe that a similar result is appropriate here. Accordingly, we vacate the trial court's termination order and remand this case to the District Court, Guilford County, for further proceedings not inconsistent with this opinion, including the entry of a new order containing

appropriate findings of fact and conclusions of law on the issue of whether grounds exist to support the termination of respondent's parental rights. On remand, the trial court shall have the discretion to determine whether the receipt of additional evidence is appropriate.

Conclusion

For the reasons stated above, we vacate the 7 January 2019 order of the trial court and remand for further proceedings not inconsistent with this opinion.

VACATED AND REMANDED.

IN THE MATTER OF S.D.C.

No. 229A19

Filed 24 January 2020

Termination of Parental Rights—best interests of child—placement with relative—evidence showing availability

The trial court did not abuse its discretion by concluding that termination of a father's parental rights would be in his child's best interests, and the court was not required to make findings on whether the child could be placed with a relative. Even though the paternal grandmother had been offered as a relative placement option in a previous proceeding, the county department of health and human services (DHHS) had refrained from recommending placement with her because of concerns about her finances, transportation, and criminal history, and the trial court had determined that the child's best interests would be served by remaining in DHHS custody rather than being placed with a relative.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 25 February 2019 by Judge Marcus A. Shields in District Court, Guilford County. This matter was calendared for argument in the Supreme Court on 17 January 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Mercedes O. Chut for petitioner-appellee Guilford County Department of Health and Human Services.

Parker Poe Adams & Bernstein LLP, by Collier R. Marsh, for respondent-appellee Guardian ad Litem.

Surratt Thompson & Ceberio PLLC, by Christopher M. Watford, for respondent-appellant father.

ERVIN, Justice.

Respondent-father DeAngelo S. appeals from an order terminating his parental rights in his son, S.D.C.[1] After careful consideration of respondent-father's challenge to the trial court's termination order, we conclude that the trial court's order should be affirmed.

On 15 December 2016, the Guilford County Department of Health and Human Services filed a petition alleging that Sam was a neglected and dependent juvenile and, on the same day, obtained the entry of an order placing him in nonsecure custody. According to the allegations contained in the DHHS petition, Sam's mother had a history of substance abuse and used heroin on the day that she gave birth to Sam.[2] In addition, DHHS alleged that Sam's mother had an extensive child protective services history, that her parental rights in two children had previously been terminated, and that she had relinquished her parental rights in another child. DHHS also alleged that, while respondent-father had been identified as Sam's putative father, he had informed DHHS that he wanted to make sure that Sam was his biological child before making any effort to care for Sam or be involved in his life. After submitting to a paternity test on 16 December 2016, respondent-father was determined to be Sam's biological father.

On 17 April 2017, Judge Angela C. Foster entered an adjudication and dispositional order finding that Sam was a neglected and dependent juvenile. In support of this determination, Judge Foster found that Sam had been born prematurely and that he had been placed in a neonatal intensive care unit as the result of "toxic exposure" to controlled

1. S.D.C. will be referred to throughout the remainder of this opinion as "Sam," which is a pseudonym used to protect the child's identity and for ease of reading.

2. The trial court terminated the parental rights of Sam's mother in the same order in which it terminated the parental rights of respondent-father. As a result of the fact that Sam's mother has not sought appellate review of the trial court's termination order, we refrain from discussing the proceedings related to the termination of the mother's parental rights in Sam in any detail in this opinion.

substances and the existence of withdrawal symptoms. Judge Foster also noted that Sam's mother had entered into a case plan with DHHS and that respondent-father was scheduled to do so as well. In addition, Judge Foster stated that, while Sam's paternal grandmother had been identified as a potential relative placement, DHHS had declined to recommend that Sam be placed with his paternal grandmother because of concerns about her financial ability to care for Sam, her lack of an adequate means of transportation, and her criminal history. Based upon these findings and conclusions, Judge Foster ordered (1) that Sam remain in the custody of DHHS while expressly authorizing DHHS to utilize a kinship placement, (2) that further efforts to reunify Sam with his mother be ended, (3) that DHHS continue its attempts to reunify Sam with respondent-father, (4) that respondent-father enter into a case plan and comply with its provisions, and (5) that respondent-father have twice-weekly supervised visitation sessions with Sam.

On 2 May 2017, Judge Foster entered a permanency planning order in which she found that respondent-father had entered into a case plan with DHHS and was making progress toward complying with its provisions and that Sam had been placed in a foster home, in which he was doing well. After determining that the custody of and placement authority relating to Sam should be retained by DHHS, Judge Foster ordered that the primary permanent plan for Sam be reunification with respondent-father, that the secondary plan for Sam be adoption, that respondent-father continue to cooperate with DHHS and attempt to comply with his case plan if he wished to work toward reunification, and that respondent-father have twice-weekly supervised visits with Sam.

Over the course of the next several months, the level of respondent-father's efforts to comply with his case plan appeared to falter. On 13 April 2018, Judge Foster entered a permanency planning order in which she found that respondent-father had stopped visiting with Sam or attempting to comply with the provisions of his case plan. As a result, Judge Foster changed Sam's primary permanent plan to adoption with a concurrent secondary plan of reunification with respondent-father and directed DHHS to initiate proceedings to terminate the parental rights of Sam's parents. After ordering respondent-father to comply with his case plan and to cooperate with DHHS, Judge Foster suspended respondent-father's visitation with Sam until respondent-father resumed making efforts to comply with the provisions of his case plan and informed respondent-father that, in the event that he continued to fail to comply with the provisions of his case plan, the court might order the cessation of reunification efforts at a subsequent proceeding.

On 7 June 2018, DHHS filed a motion seeking to have the parental rights of Sam's parents terminated in which it alleged that respondent-father's parental rights were subject to termination on the grounds of neglect, willful failure to make reasonable progress toward correcting the conditions that led to Sam's removal from the home, willful failure to pay a reasonable portion of the cost of Sam's care, and willful abandonment. *See* N.C.G.S. § 7B-1111(a)(1)–(3), (7) (2017). After holding a hearing on 12 February 2019 for the purpose of considering the issues raised by the termination motion, the trial court entered an order finding that all of the grounds for termination alleged by DHHS existed and concluding that the termination of respondent-father's parental rights in Sam would be in the child's best interests. Respondent-father noted an appeal to this Court from the trial court's termination order.

In his sole challenge to the trial court's termination order, respondent-father contends that the trial court abused its discretion by concluding that termination of his parental rights in Sam would be in Sam's best interests on the grounds that the trial court had failed to adequately consider whether Sam could be placed with a relative even though it was on notice that a potentially suitable relative placement existed. More specifically, respondent-father argues that the initial adjudication and dispositional order stated that Sam's paternal grandmother had been proposed as a placement option; that Sam's paternal grandmother had never been determined to be an unfit placement option by the court, even though DHHS had objected to Sam's placement with her; and that, given that the initial adjudication and dispositional order had been admitted into evidence at the termination hearing, the issue of whether Sam's paternal grandmother was a proper placement for the juvenile was a relevant dispositional factor which the trial court was required to consider and about which the trial court was required to make appropriate findings in its termination order. *See* N.C.G.S. § 7B-1110(a)(6) (2017). As a result, in light of the trial court's failure to consider or make findings concerning the possibility that Sam might be placed with his paternal grandmother, respondent-father contends that the trial court's termination order should be reversed.

In seeking to persuade us to affirm the trial court's termination order, DHHS argues that nothing in N.C.G.S. § 7B-1110 required the trial court to address the extent to which a potential relative placement existed at the dispositional stage of a termination of parental rights proceeding, *see* N.C.G.S. § 7B-1110 (2017), and that the record before the trial court at the termination proceeding contained no evidence tending to show that the placement of Sam with his paternal grandmother would

be appropriate. In addition, DHHS asserts that the trial court addressed its efforts to locate a suitable relative placement in earlier permanency planning orders.

Similarly, the guardian ad litem argues that a trial court may, but is not required, to consider the extent to which a relative placement is available during the dispositional phase of a termination of parental rights proceeding, *citing*, *e.g.*, *In re J.A.A.*, 175 N.C. App. 66, 75, 623 S.E.2d 45, 51 (2005) (stating that, "[i]f a fit relative were to come forward and declare their desire to have custody of the child, the court could consider this during the dispositional phase as grounds for why it would not be in the child's best interests to terminate the respondent's parental rights"). In view of the fact that no relative actually came forward at the termination hearing for the purpose of declaring his or her availability to assume responsibility for caring for Sam and the fact that the trial court found in the adjudication portion of its termination order that "[Sam's mother] and [respondent-father] did not offer any acceptable alternative placement options" in the underlying neglect and dependency proceeding, the guardian ad litem contends that the trial court did, in fact, consider whether a relative placement was available during the dispositional phase of the termination of parental rights proceeding and found that no viable option for such an alternative placement existed.

According to well-established North Carolina law, a termination of parental rights proceeding involves the use of a two-stage process that includes an adjudicatory stage and a dispositional stage. N.C.G.S. §§ 7B-1109, -1110 (2017). "At the adjudicatory stage, the petitioner bears the burden of proving by 'clear, cogent, and convincing evidence' the existence of one or more grounds for termination under section 7B-1111(a) of the General Statutes." *In re A.U.D.*, 832 S.E.2d 698, 700 (N.C. 2019) (quoting N.C.G.S. § 7B-1109(f)). "If a trial court finds one or more grounds to terminate parental rights under N.C.G.S. § 7B-1111(a), it then proceeds to the dispositional stage," *id.*, at which it "determines whether terminating the parent's rights is in the juvenile's best interest." N.C.G.S. § 7B-1110(a) (2017). In making this determination,

> [t]he court may consider any evidence, including hearsay evidence as defined in [N.C.]G.S. [§] 8C-1, Rule 801, that the court finds to be relevant, reliable, and necessary to determine the best interests of the juvenile. In each case, the court shall consider the following criteria and make written findings regarding the following that are relevant:
>
> (1) The age of the juvenile.

(2) The likelihood of adoption of the juvenile.

(3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.

(4) The bond between the juvenile and the parent.

(5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.

(6) Any relevant consideration.

Id. A trial court's determination concerning whether termination of parental rights would be in a juvenile's best interests "is reviewed solely for abuse of discretion." *In re A.U.D.*, 832 S.E.2d at 700 (citing *In re D.L.W.*, 368 N.C. 835, 842, 788 S.E.2d 162, 167 (2016). An "[a]buse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Id.* at 700–01 (alteration omitted) (quoting *In re T.L.H.*, 368 N.C. 101, 107, 772 S.E.2d 451, 455 (2015)).

A trial court is required to consider whether a relative placement is available for a juvenile in deciding the issues raised in an abuse, neglect, and dependency proceeding. *See*, *e.g.*, N.C.G.S. §§ 7B-503(a), -506(h)(2), -903(a1), -906.1(e)(2) (2017). Although the trial court is not expressly directed to consider the availability of a relative placement in the course of deciding a termination of parental rights proceeding, it may treat the availability of a relative placement as a "relevant consideration" in determining whether termination of a parent's parental rights is in the child's best interests, *see* N.C.G.S. § 7B-1110(a)(6), with the extent to which it is appropriate to do so in any particular proceeding being dependent upon the extent to which the record contains evidence tending to show whether such a relative placement is, in fact, available. *See*, *e.g.*, *In re A.U.D.*, 832 S.E.2d at 702–03 (holding that a trial court is not required to make written findings concerning factors set out in section 7B-1110(a) in the absence of conflicting evidence relating to the factor in question). In the event that such conflicting evidence concerning the availability of a potential relative placement is presented to the trial court at the termination hearing, the trial court should make findings of fact addressing "the competing goals of (1) preserving the ties between the children and their biological relatives; and (2) achieving permanence for the children as offered by their prospective adoptive family." *Id.* at 703–04 (holding that the trial court's conclusion that terminating the

father's parental rights would not be in the best interests of his children did not constitute an abuse of discretion based, in part, upon the existence of findings of fact relating to the existence of a potential relative placement for the children). On the other hand, in the event that the record does not contain any evidence tending to show the availability of a potential relative placement, the trial court need not consider or make findings of fact concerning that issue. *Id.* at 702–03 (holding that, "[a]lthough the better practice would have been for the trial court to make written findings as to the statutory factors . . . , we are unable to say that the trial court's failure to do so under the unique circumstances of this case constitutes reversible error").

The record developed at the termination hearing is devoid of any evidence tending to show that a potential relative placement was available for Sam in the event that the trial court elected to refrain from terminating respondent-father's parental rights in the child. Admittedly, Judge Foster did find in the initial adjudication and dispositional order that Sam's paternal grandmother had been offered as a relative placement option for Sam and that DHHS had refrained from recommending that Sam be placed with her. However, in contending that no judicial official had ever determined that Sam's paternal grandmother was not an available relative placement option for the child, respondent-father overlooks the fact that Judge Foster determined in the initial adjudication and dispositional order and in a series of subsequent permanency planning orders that Sam's best interests would be served by remaining in DHHS custody rather than being placed with a relative. Thus, we have no hesitation in concluding that Sam's potential placement with a relative was not a factor that the trial court was required to consider or make findings about during the dispositional phase of this termination of parental rights proceeding. As a result, the order terminating respondent-father's parental rights in Sam is affirmed.

AFFIRMED.

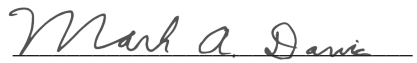
ORDER ADOPTING THE RULES OF THE DISPUTE RESOLUTION COMMISSION

Pursuant to subsection 7A-38.2(b) of the General Statutes of North Carolina, the Court hereby adopts the Rules of the Dispute Resolution Commission, which appear on the following pages. These rules supersede the Revised Rules of the North Carolina Supreme Court for the Dispute Resolution Commission, published at 367 N.C. 1063–98.

The Rules of the Dispute Resolution Commission become effective on 1 March 2020.

This order shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 23rd day of January, 2020.



For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 23rd day of January, 2020.

AMY L. FUNDERBURK
Clerk of the Supreme Court

Rules of the Dispute Resolution Commission

Rule 1. Officers and Committees of the Commission

(a) **Officers**. The North Carolina Dispute Resolution Commission (Commission) shall establish the offices of chair and vice chair.

(b) **Appointment; Elections**.

(1) The chair shall be appointed for a two-year term and shall serve at the pleasure of the Chief Justice of the Supreme Court of North Carolina.

(2) The vice chair shall be elected by majority vote of the full Commission for a two-year term and shall serve in the absence of the chair.

(3) Both the chair and vice chair shall be members of the Commission.

(c) **Committees**.

(1) The Commission shall establish a standing Executive Committee. Members of the Executive Committee shall include the chair, vice chair, and the chairs of all standing committees. The chair may also appoint the immediate past chair of the Commission to serve on the Executive Committee, if the immediate past chair remains a member of the Commission. The Executive Committee may act for the Commission and make decisions on matters which (i) require action before the next Commission meeting, and/or (ii) have been delegated to the Executive Committee by the Commission. The Executive Committee may make recommendations to the Commission with respect to matters of policy and operations of the Commission.

(2) The chair may establish other standing and ad hoc committees as are necessary to conduct the business of the Commission and may appoint Commission members and ex officio members to serve on these committees, subject to subsection (c)(3) of this rule.

(3) The chair may appoint ex officio members. Ex officio members shall be affiliated with the courts, be involved in supporting court based dispute resolution programs, or have particular expertise in dispute resolution. Ex officio members may participate in Commission or committee discussions, but shall not vote on any matter before the Commission or a committee and shall not serve as members of the Executive Committee or any committee

routinely reviewing information that is deemed confidential under N.C.G.S. § 7A-38.2(h) or these rules. Ex officio appointments shall be for a two-year term.

(d) **Recusal Policy**. Commission and ex officio members participating in Commission or committee discussions, and Commission members casting votes, shall abide by the Commission's *Recusal of Commission Members and Ex Officio Members Policy*.

Rule 2. Commission Office; Commission Staff

(a) **Commission Office**. The chair, in consultation with the director of the North Carolina Administrative Office of the Courts (NCAOC), is authorized to establish and maintain an office for the conduct of Commission business.

(b) **Commission Staff**. The chair, in consultation with the director of the NCAOC, is authorized to appoint an executive director and to: (i) fix the executive director's terms of employment, salary, and benefits; (ii) determine the scope of the executive director's authority and duties; and (iii) employ other professional and administrative staff as necessary to conduct the Commission's business.

Rule 3. Commission Membership

(a) **Vacancies**. Upon the death, resignation, or permanent incapacitation of a member of the Commission, the chair shall notify the appointing authority and request that the vacancy, created by the death, resignation, or permanent incapacitation, be filled. The appointment of a successor shall be for the former member's unexpired term. The successor shall, thereafter, be eligible to serve two consecutive three-year terms.

(b) **Disqualifications**. If, for any reason, a Commission member becomes disqualified to serve on the Commission, the appointing authority shall be notified and requested to take appropriate action. If a member resigns or is removed, then the appointment of a successor shall be for the former member's unexpired term. The successor shall, thereafter, be eligible to serve two consecutive three-year terms.

(c) **Conflicts of Interest and Recusals**. All Commission members must abide by the Commission's *Recusal of Commission Members and Ex Officio Members Policy*.

(d) **Compensation**. Under N.C.G.S. § 138-5, members of the Commission may receive compensation for their services at the rate of fifteen dollars ($15.00) per diem for each day of service, and reimbursement of subsistence and travel at the rates allowed to State boards and commissions. Ex officio members of the Commission shall receive no

compensation for their services. In the chair's discretion, an ex officio member may be reimbursed for his or her out-of-pocket expenses necessarily incurred on behalf of the Commission and for his or her mileage, subsistence, and other travel expenses at the per diem rate established by statutes and regulations applicable to State boards and commissions.

Rule 4. Meetings of the Commission

(a) **Meeting Schedule**. The Commission shall meet at least twice each year pursuant to a schedule set by the Commission and in special sessions at the call of the chair or other officer acting for the chair.

(b) **Quorum**. A majority of Commission members shall constitute a quorum. Decisions shall be made by a majority of the members present and voting, except that decisions under Rule 9 and Rule 10 shall be made in accordance with the provisions of those rules.

(c) **Public Meetings**. All meetings of the Commission for the general conduct of business shall be open to the public and minutes of such meetings shall be available to the public, except that meetings, portions of meetings, or hearings conducted under Rule 9 and Rule 10 may be closed to the public in accordance with those rules and N.C.G.S. § 7A-38.2.

(d) **Matters Requiring Prompt Action**. In the discretion of the chair, if any matter requires a decision or other action before the next regular meeting of the Commission, but does not warrant the call of a special meeting, it may be considered by the Commission and a vote or other action may be taken by correspondence, telephone, facsimile, e-mail, or other practicable method, or it may be considered an action taken by the Executive Committee under Rule 1(c)(1); provided, however, that all formal Commission and committee decisions made and actions taken are reported to the executive director and included in the minutes of Commission proceedings.

(e) **Committee Meetings.** Committees shall meet as needed. A majority of the committee members eligible to vote shall constitute a quorum for purposes of standing and ad hoc committee meetings. Decisions shall be made by a majority of the members eligible to vote who are present and voting, except that decisions under Rule 9 and Rule 10 shall be made in accordance with those rules.

Rule 5. Commission's Budget

The Commission, in consultation with the director of the NCAOC, shall prepare an annual budget. The budget and supporting financial information shall be public records.

Rule 6. Powers and Duties of the Commission

The Commission shall have the authority to undertake activities to expand public awareness of dispute resolution procedures, to foster growth of dispute resolution services in the state, and to ensure the availability of high-quality mediator training programs and competent and ethical mediators. Specifically, the Commission is authorized and directed to do the following:

(a) Review and approve or disapprove applications of: (i) persons seeking to have mediator training programs certified, (ii) attorneys and nonattorneys seeking certification as qualified mediators to conduct mediated settlement conferences and mediations in North Carolina's court-ordered mediation programs, and (iii) persons or mediator training programs seeking reinstatement.

(b) Review applications against criteria for certification set forth in rules adopted by the Supreme Court for mediated settlement conferences or mediation programs operating under the Commission's jurisdiction, and against any other requirements of the Commission which amplify and clarify those rules. The Commission may adopt application forms and require applicants to complete the forms for certification.

(c) Compile and maintain lists of certified mediator training programs along with the names of contact persons, addresses, and telephone numbers for each mediator training program, and make those lists available online or upon request.

(d) Institute periodic review of mediator training programs and trainer qualifications, and recertify mediator training programs that continue to meet criteria for certification. Mediator training programs that are not recertified shall be removed from the lists of certified mediator training programs.

(e) Compile, keep current, and make available to the courts and the public online lists of certified mediators which specify the judicial district(s) or counties in which each mediator wishes to practice.

(f) Prepare, keep current, and make available online biographical information submitted to the Commission by certified mediators in order to make such information accessible to court staff, lawyers, and the public.

(g) Make a reasonable effort on a continuing basis to ensure that the judiciary, clerks of court, court staff, attorneys, and to the extent feasible, parties to mediation, are aware of the Commission and its office and the Commission's duty to certify and regulate the conduct of mediators and mediator training programs.

(h) Regulate the conduct of mediators and mediator training programs, including (i) receiving and investigating complaints against mediators, mediator training program personnel, and mediator training programs; and (ii) imposing sanctions, if warranted under Rule 9.

Rule 7. Mediator Conduct

The conduct of all mediators certified by the Commission or serving programs under the jurisdiction of the Commission, and personnel affiliated with any certified mediator training program, must conform to the Standards of Professional Conduct for Mediators adopted by the Supreme Court and enforceable by the Commission and to the standards of any professional organization of which such person is a member that are not in conflict nor inconsistent with the Standards of Professional Conduct for Mediators. A certified mediator shall inform the Commission of any (i) criminal conviction, disbarment, or other revocation or suspension of a professional license; (ii) complaint filed against the mediator or disciplinary action imposed upon the mediator by a professional organization; or (iii) judicial sanction, civil judgment, tax lien, or filing for bankruptcy. Failure to do so is a violation of these rules. Violations of the Standards of Professional Conduct for Mediators or other professional standards, or conduct that reflects a lack of moral character or fitness to conduct mediations or which discredits the Commission, the courts, or the mediation process, may subject a mediator to disciplinary proceedings by the Commission.

Rule 8. The Standards and Advisory Opinions Committee

(a) **Appointment of the Standards and Advisory Opinions Committee**. The Commission's chair shall appoint a standing committee on standards and advisory opinions to address the matters listed in subsection (b) of this rule.

(b) **Matters to Be Considered by the Standards and Advisory Opinions Committee**. The Standards and Advisory Opinions Committee shall review and consider the following:

(1) Proposals for amending the Standards of Professional Conduct for Mediators, the Commission's *Advisory Opinion Policy*, or the Commission's *Advertising Policy*.

(2) Requests from Commission staff for assistance in responding to inquiries from mediators and the public as to the interpretation of statutes, rules, the Standards of Professional Conduct for Mediators, advisory opinions, policies, or guidelines of the Commission.

(3) Drafts and proposals of advisory opinions for adoption by the Commission under the Commission's *Advisory Opinion Policy*.

(4) Matters that relate to mediator advertising, including review of advertisements or related materials for consistency with the Commission's *Advertising Policy*.

(5) Matters that interface with the North Carolina State Bar or other professional regulatory body regarding inconsistencies and/or conflicts between these rules and/or policies and the rules and/or policies of those entities.

(c) **Initial Commission Staff Review.**

(1) Commission staff may respond in writing to requests for assistance from mediators and the public under subsection (b)(2) of this rule, or may respond orally if time is of the essence. Staff shall consult with the chair of the Standards and Advisory Opinions Committee as necessary to ensure correct and consistent responses. Written requests for formal advisory opinions shall be referred to the chair of the committee in compliance with the procedures established by the committee. The referral procedures shall ensure that the case file number, the names of parties, and other identifying information are redacted so that any decision cannot be influenced by the information.

(2) All requests for informal advice shall be logged by Commission staff, and the requesting party's confidentiality shall be maintained unless the requesting party indicates otherwise.

(d) **Review by the Standards and Advisory Opinions Committee**.

(1) If the chair of the Standards and Advisory Opinions Committee determines that a Commission advisory opinion is warranted under subsection (c) of this rule, then the matter shall be considered by the committee. If the committee concurs, then a proposed advisory opinion shall be drafted, approved by the committee, and submitted to the Commission for its consideration.

(2) If the chair of the Standards and Advisory Opinions Committee determines that a formal Commission advisory opinion is not warranted under subsection (c) of this rule, then the requesting party shall be advised in writing and provided with informal advice, if requested.

Rule 9. The Grievance and Disciplinary Committee

(a) **Appointment of the Grievance and Disciplinary Committee**. The Commission's chair shall appoint a standing committee entitled the Grievance and Disciplinary Committee to address the matters listed in subsection (b) of this rule.

(b) **Matters to Be Considered by the Grievance and Disciplinary Committee**. The Grievance and Disciplinary Committee shall review and consider, consistent with subsection (d)(2) of this rule, the following:

(1) Matters that relate to the moral character, conduct, or fitness to practice of those seeking a provisional pre-training approval, including a request to review a Commission staff determination not to issue a provisional pre-training approval on the basis of a requesting party's moral character, conduct, or fitness to practice.

(2) Matters that relate to the moral character, conduct, or fitness to practice of an applicant for mediator certification or certification renewal, including a request for review of a Commission staff decision to deny an application for mediator certification or certification renewal on the basis of the applicant's moral character, conduct, or fitness to practice.

(3) Matters otherwise self-reported by a certified mediator or personnel affiliated with a certified mediator training program, or otherwise coming to the attention of the Commission that relate to the moral character, conduct, or fitness to practice of a mediator under the Commission's jurisdiction or a person affiliated with a certified mediator training program.

(4) Matters that relate to the moral character, conduct, or fitness to practice of a trainer or other person affiliated with a certified mediator training program or a mediator training program that is an applicant for certification or certification renewal, including a request for review of a Commission staff decision to deny an application for mediator training program certification or certification renewal on the basis of the moral character, conduct, or fitness to practice of any trainer or other person affiliated with the program.

(5) Complaints by a Commission member, Commission staff, a judge, an attorney, court staff, or any member of the public that relate to the moral character, conduct, or fitness to practice of a mediator under the Commission's

jurisdiction or a trainer or other person affiliated with a certified mediator training program.

(c) **Initial Commission Staff Review and Determination**.

(1) **Review of Requests for Provisional Pre-training Approvals**. Commission staff shall review requests for the issuance of provisional pre-training approvals regarding matters that relate to the moral character, conduct, or fitness to practice of a requesting party, and shall seek guidance from the chair of the Grievance and Disciplinary Committee, as necessary. Staff may contact the requesting party, conduct background checks, and contact third parties or entities who may possess relevant information that relates to the moral character, conduct, or fitness to practice of the requesting party. Based on its review, staff shall determine whether to issue or refrain from issuing a provisional pre-training approval. The requesting party may seek review of the staff decision from the chair of the committee. If, after review, the chair determines that the requesting party does not possess the requisite criteria for certification related to moral character, conduct, or fitness to practice established by program rules and Commission policies and guidelines, then the chair shall instruct staff not to issue a provisional pre-training approval. The staff decision, or that of the chair after review, to deny a request for a provisional pre-training approval shall be final and is not subject to appeal.

(2) **Review and Referral of Matters Relating to the Moral Character, Conduct, or Fitness to Practice of Applicants**. Commission staff shall review information relating to the moral character, conduct, or fitness to practice of an applicant seeking mediator certification or certification renewal, including matters which an applicant is required to report under program rules and information relating to the moral character, conduct, or fitness to practice of personnel affiliated with mediator training programs seeking certification or certification renewal.

Staff may contact an applicant to discuss matters reported and may conduct a background check on an applicant. Any third party with knowledge of any information relating to the moral character, conduct, or fitness to practice of an applicant may notify the Commission. Staff shall seek to verify any such third party report and

may disregard a report that cannot be verified. Staff may contact an agency where a complaint about an applicant has been filed or that has imposed discipline on an applicant and may contact a judge who has imposed discipline on an applicant.

All reported matters or other information gathered by staff that bears on the moral character, conduct, or fitness to practice of an applicant shall be forwarded directly to the Grievance and Disciplinary Committee for its review, except matters expressly exempted from review by the Commission's *Policy for Reviewing Matters Relevant to Good Moral Character, Conduct, and Fitness to Practice*. Matters that are exempted by the policy may be processed by staff, but will not act as a bar to certification or certification renewal.

The committee shall review any matter that relates to an applicant and is referred by staff under this policy, while not a complaint, in accordance with the procedures set forth in subsection (d) of this rule.

(3) **Commission Staff Review of Concerns Raised That Are Not Deemed to Constitute Complaints**. Commission staff shall review information received or concerns raised that relates to a mediator's failure to meet his or her case management duties under applicable program rules, or relates to matters that are not deemed to constitute a complaint under this subsection or subsection (c)(4) of this rule.

a. If the information received or the concern raised does not state a violation of rules or standards promulgated by the Supreme Court or local district rules, then the reporting party will be advised that the Commission will take no action in response to the report.

b. If it appears that the information received or the concern raised constitutes a violation of a rule, statute, or standard, but either is not serious enough to be treated as a complaint or the complaining party does not wish to file a complaint, Commission staff shall prepare a summary of the concern raised and submit the matter to the chair of the Grievance and Disciplinary Committee and to the chair of the Commission.

c. Commission staff shall report the concerns to the mediator by letter or other manner of communication as approved by the chair of the Grievance and Disciplinary Committee and chair of the Commission. Any written correspondence shall be copied to the chair of the committee and to the chair of the Commission.

Commission staff shall not disclose the identity of a reporting party who wishes to remain anonymous. If a reporting party wishes to remain anonymous, then staff shall not proceed under this section unless evidence of the mediator's failure to fulfill his or her case management duties has been provided or otherwise exists.

(4) **Commission Staff Review of Oral or Written Complaints**. Commission staff shall review oral and written complaints received by the Commission regarding the moral character, conduct, or fitness to practice of a mediator under the jurisdiction of the Commission or any personnel affiliated with a certified mediator training program (respondents), except that staff shall not act on anonymous complaints unless staff can independently verify the allegations made.

a. **Oral Complaints**. If, after reviewing an oral complaint, Commission staff determines it is necessary to contact a third party about the matter, including a witness identified by the complaining party or other third party identified by Commission staff during its review of the complaint, or to refer the matter to the Grievance and Disciplinary Committee, then Commission staff shall first make a summary of the complaint and forward it to the complaining party who shall be asked to sign the summary and a release and to return both to the Commission's office. A member of the Commission, a committee of the Commission, Commission staff, judges, other court officials, or court staff may initiate an oral, anonymous complaint. Commission staff shall not proceed under this subsection unless corroborative evidence of the allegation relating to the mediator's conduct has been provided to the Commission.

b. **Written Complaints**. Commission staff shall acknowledge all written complaints within thirty days from receipt. A written complaint may be

made by letter, e-mail, or filed on the Commission's approved complaint form. If a written complaint is not made on the approved form, then staff shall require the complaining party to have his or her signature on the complaint notarized and execute a release authorizing staff to contact third parties in the course of staff's review of the complaint.

c. **Pursuit of Complaint by Commission Staff or by Grievance and Disciplinary Committee Member**. If a complaining party refuses to sign a complaint summary prepared by Commission staff, refuses to sign a release, or otherwise seeks to withdraw a complaint after filing it with the Commission, staff or a Grievance and Disciplinary Committee member may pursue the complaint. In determining whether to pursue a complaint independently, staff or a committee member may consider why the complaining party is unwilling to pursue the matter further, whether the complaining party is willing to testify if a hearing becomes necessary, whether the complaining party has specifically asked to withdraw the complaint, whether the circumstances complained of may be independently verified without the complaining party's participation, whether there have been previous complaints filed regarding the respondent's conduct, and the seriousness of the allegations made in the complaint.

d. **Response to Complaint**. If Commission staff asks a respondent to respond in writing to an oral or written complaint, then the respondent shall be sent a summary or a copy of the complaint and any supporting evidence provided by the complaining party by Certified Mail, return receipt requested. The respondent shall respond no later than thirty days from the date of the actual delivery to the respondent or the date of the last attempted delivery by the U.S. Postal Service. A copy of the summary or complaint shall also be sent to respondent through the U.S. Postal Service by First-Class Mail directed to the respondent at the last mailing address provided to the Commission by the respondent. Upon written request, the respondent may be afforded ten additional days to respond to the complaint.

e. **Materials Not Forwarded to Complaining Party.** The respondent's response to the complaint and the summaries of comments of any witnesses or others contacted during the investigation shall not be forwarded to the complaining party, except as may be required by N.C.G.S. § 7A-38.2(h).

(5) **Initial Determination on Oral and Written Complaints**. In reviewing a complaint under subsection (c)(4) of this rule and any additional information gathered, including information supplied by the respondent or a witness or other third party contacted, Commission staff shall consider the conduct complained of by reference to subsection (d)(2) of this rule. Staff shall determine whether to:

a. **Recommend Dismissal**. After review and upon concluding that the complaint does not allege facts sufficient to constitute a violation of a statute, rule, standard, or policy enforceable under the jurisdiction of the Commission, Commission staff shall make a recommendation to the chair of the Grievance and Disciplinary Committee to dismiss the complaint. If the chair agrees with the recommendation, then the complaint shall be dismissed with notification to the complaining party, the respondent, and any witnesses or others contacted during the review process. The complaining party and the respondent shall be notified of the dismissal by Certified Mail, return receipt requested, and such service shall be deemed sufficient for purposes of these rules. A copy of the notice of dismissal shall also be sent to the complaining party and the respondent through the U.S. Postal Service by First-Class Mail directed to the respondent and complaining party at the last mailing address provided to the Commission.

Staff shall note for the file why a determination was made to dismiss a complaint and shall report on such dismissals to the committee. Dismissed complaints shall remain on file with the Commission. The committee may take dismissed complaints into consideration if additional complaints are later made against the same respondent.

A complaining party may file a written appeal of the dismissal of the complaint to the committee

no later than thirty days from the date of the actual delivery of the notice of dismissal to the complaining party or of the date of the last attempted delivery by the U.S. Postal Service of the notice of dismissal.

b. **Refer to the Grievance and Disciplinary Committee**. Following an initial Commission staff review of the complaint and any response submitted by the respondent, including contacting the respondent, witnesses, or other third parties as necessary, and upon a determination that the complaint (i) raises a concern about a possible violation of a statute, a program rule, the Standards of Professional Conduct for Mediators, or a Commission policy; or (ii) raises a significant question about a respondent's moral character, conduct, or fitness to practice, or if, after giving the complaint due consideration, the chair of the Grievance and Disciplinary Committee disagrees with staff's recommendation to dismiss the complaint, staff shall refer the matter to the full committee for review.

No matter shall be referred to the committee until the respondent has been forwarded a copy or summary of the complaint and a copy of these rules. The respondent shall respond no later than thirty days from the date of the actual delivery of the letter transmitting the complaint or summary to the respondent or the last attempted delivery to the respondent by the U.S. Postal Service. A copy of the complaint or summary shall also be sent to the respondent through the U.S. Postal Service by First-Class Mail directed to the respondent at the last mailing address provided to the Commission by the respondent. Upon written request, the respondent may be afforded ten additional days to respond to the complaint.

The respondent's response shall be included in the materials forwarded to the committee. If a witness or other person was contacted, any written response or summary of a response shall also be included in the materials forwarded to the committee.

(6) **Filing Deadlines for Complaints**. A complaint made under subsection (b) of this rule that relates to the conduct of a certified mediator during a mediation, from appointment or selection of the mediator through the conclusion of the mediation by settlement or impasse, shall be filed no later than one year from the conclusion of the mediation by settlement or impasse, except that a complaint that relates to the conduct of a certified district criminal court mediator during a mediation, from the beginning of the mediation through the conclusion of the last session of mediation, shall be filed no later than ninety days from the conclusion of the last mediation session. A complaint made under subsection (b) of this rule that relates to the conduct of a person affiliated with a certified mediator training program during a training program shall be filed no later than one year from the conclusion of the training program.

(7) **Confidentiality**. Commission staff will create and maintain files for all matters considered under subsection (b) of this rule. All information in the files pertaining to applicants for certification, certification of a mediator training program, or certification renewal shall remain confidential in accordance with N.C.G.S. § 7A-38.2(h). Information pertaining to complaints regarding the moral character, conduct, or fitness to practice of mediators or trainers or personnel affiliated with certified mediator training programs shall remain confidential until such time as the Grievance and Disciplinary Committee completes its preliminary investigation, finds probable cause under subsection (d)(2) of this rule and N.C.G.S. § 7A-38.2(h), and the time within which the respondent may appeal the determination of probable cause has expired, or if the respondent files a timely appeal under subsection (e) of this rule, the information shall remain confidential until a hearing is held and a decision is reached by the Commission.

Staff shall reveal the names of applicants and respondents to the committee and the committee shall keep the names of applicants and respondents and other identifying information confidential, except as provided for in N.C.G.S. § 7A-38.2(h) and subsection (d)(3) of this rule.

Notwithstanding the above, staff shall notify the executive director of the Mediation Network of North

Carolina, and the executive director of the community mediation center that is sponsoring the application of an applicant seeking certification as a district criminal court mediator, of any matter regarding the moral character, conduct, or fitness to practice of the applicant.

Staff shall notify any mediation program or agency populating a list of mediators certified by the Commission, including, but not limited to, the Mediation Network of North Carolina, community mediation centers, the North Carolina Industrial Commission, and the federal trial courts in North Carolina, of any finding of probable cause under this subsection against a mediator arising out of a mediated settlement conference conducted under the auspices of such agency or program. When practicable, staff shall notify the agency or program of any public sanction imposed by the Commission under these rules against a certified mediator who also serves as a mediator for that agency or program.

Staff and members of the Grievance and Disciplinary Committee may share information with other committee chairs or committees if needed and relevant to a review of any matter before such other committee.

The Commission may publish names, contact information, and biographical information for mediators, neutrals, and mediator training programs that have been certified or qualified.

(d) **Grievance and Disciplinary Committee Review and Determination on Matters Referred by Commission Staff**.

(1) **Grievance and Disciplinary Committee Review of Moral Character Issues and Complaints**. The Grievance and Disciplinary Committee shall review matters brought before it by Commission staff under the provisions of subsection (c) of this rule and may contact any other persons or entities with knowledge of the matter for additional information. The chair may, in his or her discretion, appoint members of the committee to serve on a subcommittee to investigate a particular matter brought to the committee by staff. The chair of the committee, or his or her designee, may issue subpoenas for the attendance of witnesses and for the production of books, papers, materials, or other documentary evidence deemed necessary to the committee's investigation and review of the matter.

(2) **Grievance and Disciplinary Committee Deliberation**. The Grievance and Disciplinary Committee shall deliberate to determine whether probable cause exists to believe that an applicant or respondent's conduct:

a. is a violation of the enabling legislation for a mediated settlement conference program under the jurisdiction of the Commission or a violation of N.C.G.S. § 7A-38.2;

b. is a violation of the Standards of Professional Conduct for Mediators or any other standards of professional conduct that are not inconsistent with the Standards of Professional Conduct for Mediators and to which the respondent is subject;

c. is a violation of Supreme Court rules or any other rules for mediated settlement conferences or mediation programs;

d. is inconsistent with good moral character (*See* Rule 8(a)(4) of the Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions, Rule 8(a)(7) of the Rules for Settlement Procedures in District Court Family Financial Cases, Rule 7(a)(4) of the Rules of Mediation for Matters in District Criminal Court, and Rule 7 of these rules);

e. reflects a lack of fitness to conduct mediated settlement conferences or mediations, or to serve in affiliation with a certified mediator training program (*See* Rule 7);

f. serves to discredit the Commission, the courts, or the mediation process (*See* Rule 7); or

g. is a violation of a Commission policy.

(3) **Grievance and Disciplinary Committee Determination**. Following deliberation, the Grievance and Disciplinary Committee shall determine whether to dismiss the matter, make a referral, or impose sanctions, as follows:

a. **To Dismiss**. If a majority of the Grievance and Disciplinary Committee members review an issue of, or a complaint about, moral character, conduct, or fitness to practice and find no probable cause to believe that the applicant or respondent's conduct is a violation of subsection (d)(2) of this rule, then

the committee shall dismiss the matter and instruct Commission staff to:

1. certify or recertify the applicant, if an application is pending, or notify the respondent by Certified Mail, return receipt requested, with a copy sent by First Class Mail through the U.S. Postal Service, that no further action will be taken in the matter; or
2. notify the complaining party and the respondent by Certified Mail, return receipt requested, that no further action will be taken and that the matter is dismissed. A copy of the notice of dismissal shall also be sent to the respondent and the complaining party through the U.S. Postal Service by First-Class Mail.

b. **To Refer.** If, after reviewing an application for certification or certification renewal or a complaint, a majority of the Grievance and Disciplinary Committee members eligible to vote determine that:

1. any violation of a statute, a program rule, the Standards of Professional Conduct for Mediators, or a Commission policy was technical or relatively minor in nature, caused minimal harm to the complaining party, and did not discredit the program, courts, or Commission, then the committee may:

i. dismiss the complaint with a letter to the complaining party and respondent by Certified Mail, return receipt requested, and a copy of the letter through the U.S. Postal Service by First-Class Mail directed to the complaining party and the respondent at the last mailing address provided to the Commission by the complaining party and the respondent, notifying them of the dismissal, citing the violation, and advising the respondent to avoid such conduct in the future; or

ii. refer the respondent to one or more members of the committee to discuss the matter and explore ways that the

respondent may avoid similar complaints in the future.

2. the respondent's conduct involves no violation, but raises best practices or professionalism concerns, then the committee may:

   i. direct Commission staff to dismiss the complaint with a letter sent by Certified Mail, return receipt requested, and a copy through the U.S. Postal Service by First Class Mail to the complaining party and the respondent directed to the complaining party or respondent at the last mailing address provided to the Commission by the complaining party or the respondent advising him or her of the committee's concerns and providing guidance;

   ii. direct the respondent to meet with one or more members of the committee, who will informally discuss the committee's concerns and provide counsel; or

   iii. refer the respondent to the Chief Justice's Commission on Professionalism for counseling and guidance.

3. the applicant or respondent's conduct raises significant concerns about his or her fitness to practice, including concerns about mental instability, mental health, lack of mental acuity, possible dementia, or possible alcohol or substance abuse, then the committee may, in lieu of or in addition to imposing sanctions, refer the applicant or respondent to the North Carolina Lawyer Assistance Program for evaluation or, if the applicant or respondent is not an attorney, to a physician, other licensed mental health professional, or substance abuse counselor or organization.

In the event that an applicant or respondent is referred to one or more members of the committee for counsel, to the Lawyer Assistance Program, or to some

other professional entity, and fails to cooperate regarding the referral or refuses to sign releases or provide any resulting evaluations to the committee, or should any resulting discussion or evaluation suggest that the applicant or respondent is not currently capable of serving as a mediator, trainer, or manager, the committee may make further determinations in the matter. Pending further review, the committee may also recommend summary suspension under subsection (d)(4) of this rule until such time as the committee has authorized the applicant or respondent to return to active mediation practice. The committee may condition a certification or certification renewal on the applicant or respondent's successful completion of the referral process. Any costs associated with a referral, e.g., costs of evaluation or treatment, shall be borne entirely by the applicant or respondent.

c. **To Impose Sanctions**. Except as provided for in subsection (d)(3)(b)(1) of this rule, if a majority of the Grievance and Disciplinary Committee members find probable cause under subsection (d)(2) of this rule, then the committee shall impose sanctions on the applicant or respondent under subsection (e)(13) of this rule.

Notification of any dismissal, referral, or sanction imposed under subsection (d)(3) of this rule shall be sent to respondent by Certified Mail, return receipt requested, and a copy sent through the U.S. Postal Service by First-Class Mail directed to the last mailing address provided to the Commission by the respondent, and such service shall be deemed sufficient for the purposes of these rules. All witnesses and any others contacted by Commission staff or a committee member shall be notified, if feasible, of a dismissal of the complaint.

A complaining party shall have no right of appeal from a committee determination to dismiss a complaint under subsection (d)(3)(a) of this rule or from a committee determination to refer a mediator under subsection (d)(3)(b) of this rule.

A letter issued under subsection (d)(3)(a) or subsection (d)(3)(b) of this rule regarding conduct or referral shall not be considered sanctions under subsection (e)(13) of this rule. Rather, the letters are intended to be opportunities to address concerns and to help applicants and respondents perform more effectively as mediators. However, there may be instances that are more serious in nature where the committee may both make a referral under subsection (d)(3)(b) of this rule and impose sanctions under subsection (e)(13) of this rule.

(4) **Summary Suspension**. If, after initiation of a complaint against a respondent certified by the Commission and during review by the Grievance and Disciplinary Committee, the committee determines and the chair of the Commission concurs that the conduct of the respondent raises a serious issue regarding the health, safety, or welfare of the mediator or the public, or may adversely affect the integrity of the courts, and that there is a necessity for prompt action, then the Commission, through its chair, may petition the court to restrain or enjoin the respondent's conduct, including suspending the mediator from active service as a mediator in North Carolina. The petition for injunctive relief shall be filed in the Superior Court, Wake County.

(5) **Right to Object and Negotiate**. Within the thirty-day period set forth in subsection (d)(6) of this rule, an applicant or respondent may contact the Grievance and Disciplinary Committee and object to any referral made or sanction imposed on the applicant or respondent, including objecting to any public posting of a sanction, and seek to negotiate some other outcome with the committee. The committee shall have the authority and discretion to engage or decline to engage in negotiations with the applicant or respondent. During the negotiation period, the applicant or respondent may request an extension of the time in which to request an appeal in writing under this subsection and subsection (d)(6) of this rule. Commission staff, in consultation with the committee chair, may extend the appeal period up to an additional thirty days in order to allow more time to complete negotiations.

(6) **Right of Appeal**. If a referral is made or sanctions are imposed, then the applicant or respondent may file an

appeal with the Commission in writing no later than thirty days from the date of the actual delivery of the notice to the applicant or respondent, or within thirty days from the last attempted delivery by the U.S. Postal Service. Subject to the provisions of subsection (d)(5) of this rule, if no appeal is received within thirty days as set out herein, then the applicant or respondent shall be deemed to have accepted the Grievance and Disciplinary Committee's findings and the imposition of sanctions. The complaining party does not have a right to appeal from a decision of the committee to dismiss the complaining party's complaint against the respondent.

(7) **Notification**. At such time as the matter becomes public under subsection (c)(7) of this rule and N.C.G.S. § 7A-38.2(h), Commission staff shall, if feasible, notify the complaining party and any witnesses or others contacted during the investigation of the complaint by staff or the Grievance and Disciplinary Committee of the sanctions imposed and the fact of the respondent's appeal, if filed.

(e) **Appeal to the Commission**.

(1) **Stay Pending Appeal**. The imposition of a private or public sanction by the Grievance and Disciplinary Committee shall be stayed, pending the final disposition of an appeal properly filed by the respondent with the Commission.

(2) **The Commission Shall Meet to Consider Appeals**. In the discretion of the Commission's chair, an appeal by the respondent to the Commission of the Grievance and Disciplinary Committee's determination under subsection (d)(6) of this rule shall be heard either by (i) a five-member panel of Commission members chosen by the chair or the chair's designee, or (ii) the members of the full Commission. Any members of the committee who participated in issuing the committee's determination shall be recused and shall not participate in the hearing. Under Rule 3(c), members of the Commission shall recuse themselves from hearing the matter when they cannot act impartially. No matter shall be heard and decided by less than three Commission members.

(3) **Conduct of the Hearing**.

a. At least thirty days prior to the hearing before the Commission or panel, Commission staff shall forward to all parties, special counsel to the Commission,

and members of the Commission or panel who will hear the matter, a copy of all documents considered by the Grievance and Disciplinary Committee and the names of the members of the Commission or panel who will hear the matter. Any written challenge questioning the neutrality of a member of the Commission or panel shall be directed to and decided by the Commission's chair or the chair's designee. A written challenge shall be filed with the Commission no later than seven days from the date the person filing the challenge received notice of the members who will hear the appeal.

b. Hearings conducted by the Commission or a panel under this rule shall be de novo.

c. Applicants, complainants, respondents, and any witnesses or others identified as having relevant information about the matter may appear at the hearing with or without counsel.

d. An appeal from a denial of an initial application for certification or qualification of a mediator, neutral, or mediator training program that relates to moral character, conduct, or fitness to practice shall be held in private unless the applicant requests a public hearing. An appeal from a denial of an application for certification renewal or reinstatement that relate to ethics or conduct shall be open to the public except that, for good cause shown, the presiding officer may exclude from the hearing room all persons except the parties, counsel, and those engaged in the hearing.

e. In the event that the applicant, complaining party, or respondent fails to appear without good cause, the Commission or panel shall proceed to hear from the parties and witnesses who are present and make a determination based on the evidence presented at the proceeding.

f. Proceedings before the Commission or panel shall be conducted informally, but with decorum.

g. The Commission or panel, through its counsel, and the applicant or respondent, may present evidence in the form of sworn testimony and/or written documents and may cross-examine any witness called

to testify by the other. Commission or panel members may question any witness called to testify at the hearing. The Rules of Evidence shall not apply, except as to privilege, but shall be considered as a guide toward a full and fair development of the facts. The Commission or panel shall consider all evidence presented and give the evidence appropriate weight and effect.

h. If, in the discretion of the Commission's chair, a panel is empaneled to hear the appeal, then the Commission's chair or designee shall appoint one of the members of the panel to serve as the presiding officer at the hearing before the panel. The Commission's chair or designee shall serve as the presiding officer at a hearing before the full Commission. The presiding officer shall have such jurisdiction and powers as are necessary to conduct a proper and efficient hearing and disposition of the matter on appeal. The presiding officer may administer oaths and may issue subpoenas for the attendance of witnesses and the production of books, papers, or other documentary evidence.

i. Nothing herein shall restrict the chair of the Commission from serving on a panel or serving as its presiding officer at any hearing held under the provisions of subsection (e) of this rule.

(4) **Date of the Hearing**. An appeal of any sanction imposed by the Grievance and Disciplinary Committee shall be heard by the Commission no later than 180 days from the date the notice of appeal is filed with the Commission, unless waived in writing by the respondent.

(5) **Notice of the Hearing**. The Commission's office shall serve on all parties by Certified Mail, return receipt requested, notice of the date, time, and place of the hearing no later than sixty days prior to the hearing, and such service shall be deemed sufficient for the purposes of these rules. A copy of the hearing notice shall also be sent through the U.S. Postal Service by First-Class Mail directed to the respondent at the last mailing address provided to the Commission by the respondent.

(6) **Ex Parte Communications**. With the exception of Commission staff, no person shall have any ex parte communication with a member of the Commission concerning

the subject matter of the appeal. Communications regarding scheduling matters shall be directed to staff.

(7) **Attendance**. The presiding officer may, in his or her discretion, permit an attorney to represent a party by telephone or through video conference or allow witnesses to testify by telephone or through video conference, with such limitations and conditions as are just and reasonable. If an attorney or witness wishes to appear by telephone or video conference, then the requesting party shall notify Commission staff at least twenty days prior to the proceeding. At least five days prior to the proceeding, staff must be provided with the contact information of those who will participate by telephone or video conference.

(8) **Witnesses**. The presiding officer shall exercise discretion with respect to the attendance and number of witnesses who appear voluntarily or involuntarily, for the purpose of ensuring the orderly conduct of the proceeding. Each party shall forward to the Commission's office and to all other parties at least ten days prior to the hearing the names of all witnesses who will be called to testify.

(9) **Rights of the Applicant or Respondent at the Hearing**. At the hearing, the applicant or respondent may:

a. appear personally and be heard;

b. be represented by counsel;

c. call and examine witnesses;

d. offer exhibits; and

e. cross-examine witnesses.

(10) **Transcript**. The Commission shall retain a court reporter to keep a record of the proceeding. Any respondent who wishes to obtain a transcript of the record may do so at his or her own expense by contacting the court reporter directly. The only official record of the proceeding shall be the one made by the court reporter retained by the Commission. Copies of a tape, noncertified transcript, or record made by a court reporter retained by a respondent are not part of the official record.

(11) **Commission Deliberation**. The members of the Commission or panel shall deliberate to determine

whether clear, cogent, and convincing evidence exists to believe that an applicant or respondent's conduct is a violation of any of the provisions set out in subsection (d)(2) of this rule.

(12) **Commission Decision**. After the hearing, a majority of the Commission members hearing the appeal or the panel may find that:

a. there is not clear, cogent, and convincing evidence to support a referral or the imposition of sanctions and, therefore, dismiss the complaint or direct Commission staff to certify the applicant or recertify the mediator or mediator training program; or

b. there is clear and convincing evidence that grounds exist to refer or to impose sanctions. The Commission or panel may impose the same or different sanctions than those imposed by the Grievance and Disciplinary Committee or make the same or a different referral.

The Commission or panel shall set forth its findings of fact, conclusions of law, order of referral and/or imposition of sanctions, or other action in writing and serve its decision on the respondent within sixty days from the date the hearing is concluded. A copy of the decision shall be sent by Certified Mail, return receipt requested, and such service shall be deemed sufficient for purposes of these rules. A copy of the decision shall also be sent through the U.S. Postal Service by First-Class Mail directed to the respondent at the last mailing address provided to the Commission by the respondent.

A decision of the Commission or panel shall be, subject to subsection (e)(15) of this rule, the final decision of the Commission.

(13) **Private and Public Sanctions**.

a. Private Sanctions. The Grievance and Disciplinary Committee, or the Commission members or panel who heard the respondent's appeal, may impose private sanctions against an applicant or respondent, which include the following:

1. Letter of warning (a written communication to the respondent stating that the respondent's conduct, while not a basis for public sanctions,

was an unintentional, minor, or technical violation of a statute, rule, policy, or the Standards of Professional Conduct for Mediators, or was unprofessional or not in accord with accepted professional practice, and if continued, may be a basis for public sanctions).

2. Reprimand (a written communication to the respondent stating that the respondent's conduct, although a violation of a statute, rule, policy, or the Standards of Professional Conduct for Mediators, was minor and, if continued, may result in public sanctions).

3. Denial of certification of an initial application.

4. Approval of certification or certification renewal upon enumerated condition(s).

5. Any other private sanction deemed appropriate by the Commission members who heard the appeal or the panel, including referrals as authorized by subsection (d)(3)(b) of this rule.

b. **Public Sanctions**. The Grievance and Disciplinary Committee, the Commission members who heard the appeal, or the panel may impose public sanctions against the respondent which include, but are not limited to, the following:

1. Censure (a written communication to the respondent stating that the violation of a statute, rule, Commission policy, or the Standards of Professional Conduct for Mediators is serious, has caused or could cause significant or potential harm, and if continued, may result in the imposition of more serious sanctions).

2. Reinstatement upon condition(s).

3. Suspension of certification for a specified term, with or without condition(s).

4. Denial of certification renewal.

5. Denial of reinstatement.

6. Decertification.

7. Any other sanction deemed appropriate by the Commission members who heard the appeal or the panel.

c. **Imposition of Conditions**. The Grievance and Disciplinary Committee or the panel may impose any sanction set forth in subsections (e)(13)(a) and (e)(13)(b) of this rule subject to reasonable conditions, which may include, but are not limited to, the following:

1. Completion of additional training.
2. Restriction on the types of cases to be mediated in the future.
3. Reimbursement of the fees paid to the mediator or mediator training program.
4. Prohibition on participation as a trainer or person associated with a certified mediator training program, either indefinitely or for a specific period of time.
5. Completion of additional observations.
6. Any other condition deemed appropriate by the Commission members who heard the appeal or the panel.

d. **Factors that May Be Considered in Imposing Sanctions and/or Conditions**.

1. The intent of the respondent to commit acts resulting in harm or the circumstances under which the potential of causing harm was foreseeable.
2. The circumstances reflecting the respondent's lack of honesty, trustworthiness, or integrity.
3. A dishonest or selfish motive, or the absence thereof.
4. Any negative impact of the respondent's conduct on third parties, the public's perception of the mediation process, or the administration of justice.
5. A conviction of a felony.

6. Any prior disciplinary offenses, or the absence thereof.
7. The remoteness of prior disciplinary offenses.
8. Any timely good faith efforts to rectify the consequences of misconduct.
9. A pattern of misconduct.
10. The effect of any physical or mental disability or impairment, or personal or emotional problems, on the conduct in question.
11. A full disclosure and cooperative attitude toward the disciplinary process.
12. Any bad faith obstruction of the disciplinary process by intentionally failing to comply with rules or orders of the Commission or by submitting false evidence or making false statements to the Commission.
13. The respondent's failure to acknowledge the wrongful nature of his or her conduct or to express remorse.
14. An expression of remorse and acknowledgement of the wrongful nature of the respondent's conduct.
15. The character or reputation of the respondent.
16. The respondent's mediation experience and the number of years that the respondent has been certified.
17. Any other factor found to be pertinent to the consideration of the sanctions to be imposed.

(14) **Publication of Grievance and Disciplinary Committee or Commission Decisions**.

a. The names of respondents who have been issued a private sanction as set forth in subsection (e)(13)(a) of this rule or applicants who have never been certified but have been denied certification shall not be published by the Commission.

b. The names of respondents or applicants for certification renewal who are sanctioned under any provision of subsection (e)(13)(b) of this rule or who have been denied reinstatement under this

rule shall be published by the Commission, along with a short summary of the facts involved and the discipline imposed. For good cause shown, the Grievance and Disciplinary Committee or the Commission may waive this requirement.

c. Chief district court judges, senior resident superior court judges, and clerks in judicial districts and counties in which a respondent is available to serve, the North Carolina State Bar and any other professional licensing or certification bodies to which a respondent is subject, and other trial forums or agencies having mandatory programs and using mediators certified by the Commission shall be notified of any public sanction and/or condition imposed upon a respondent.

(15) **Appeal**. The Superior Court, Wake County, shall have jurisdiction over appeals of Commission or panel decisions imposing sanctions or denying applications for mediator or mediator training program certification or certification renewal. An order imposing sanctions or denying an application for mediator or mediator training program certification or certification renewal shall be reviewable upon appeal, and the entire record, as submitted, shall be reviewed to determine whether the order is supported by substantial evidence. Notice of appeal by a respondent shall be filed in the Superior Court, Wake County, no later than thirty days from the date of the actual delivery of the order imposing sanctions or denying certification or certification renewal to the applicant or respondent, or no later than thirty days from the date of the last attempted delivery to the applicant or respondent by the U.S. Postal Service. A copy of the notice of appeal shall also be sent to the applicant or respondent through the U.S. Postal Service by First-Class Mail directed to respondent or applicant at the last mailing address provided to the Commission by the applicant or respondent.

(16) **Effective Date of Sanction Imposed**. A sanction imposed against a respondent becomes effective either upon the expiration of the period within which an applicant or respondent may appeal the determination of the Grievance and Disciplinary Committee, or upon a final decision by the Commission or a panel after hearing a timely appeal of the committee's imposition of sanctions.

(17) **Petition for Reinstatement or New Application Following a Denial of Initial or Subsequent Application**. An applicant whose application for certification has been denied under the provisions of subsection (e)(13)(a) of this rule may be certified, or a respondent who has been decertified may be reinstated, under subsection (e)(17)(h) of this rule. Except as otherwise provided by the Grievance and Disciplinary Committee, the Commission, or a panel of the Commission, no petition for reinstatement or new application for certification following a denial may be tendered within two years of the date of the order of decertification or the date of denial of the application for certification.

a. A petition for reinstatement or a new application for certification after a denial shall be made in writing, verified by the applicant or petitioner, and filed with the Commission's office.

b. The petition for reinstatement or the new application for certification following a denial shall contain:

1. the name and address of the applicant or petitioner;

2. the reasons why certification was denied or the moral character, conduct, or fitness concerns upon which the suspension, decertification, or bar to serving as a trainer or training program manager was based;

3. a concise statement of facts alleged to meet the applicant or petitioner's burden of proof as set forth in subsection (e)(17)(g) of this rule and alleged to justify certification or reinstatement as a certified mediator or certified mediator training program; and

4. a statement consenting to a criminal background check, signed by the applicant or petitioner; or, if the applicant or petitioner is a mediator training program, by the trainers or instructors affiliated with the program.

c. The petition for reinstatement or the application for certification following a previous denial may also contain a request for a hearing on the matter to consider any additional evidence which the

applicant or petitioner wishes to submit, including any third-party testimony regarding his or her moral character, competency, or fitness to practice as a mediator. A petition or application for certification from a mediator training program may contain a request for a hearing on the matter to consider any additional evidence regarding the effectiveness of the program and/or the qualifications of its trainer(s).

d. Commission staff shall refer the petition for reinstatement or the application for certification following a denial to the Commission for review. In the discretion of the Commission's chair, the chair or designee may (i) appoint a five-member panel of Commission members to review the matter, or (ii) put the matter before the Commission for review. The panel shall not include any members of the Commission who were involved in any prior determination involving the applicant or petitioner. Members of the Commission shall recuse themselves from reviewing any matter if they cannot act impartially. Any challenges questioning the neutrality of a member reviewing the matter shall be decided by the Commission's chair or designee. No matter shall be heard and decided by less than three Commission members.

e. If the applicant or petitioner does not request a hearing under subsection (e)(17)(c) of this rule, then the Commission or panel members shall review the application or petition and shall decide whether to grant or deny the applicant's application for certification or the petitioner's petition for reinstatement after denial within sixty days from the filing of the application or petition. That decision shall be final.

If the applicant or petitioner requests a hearing, it shall be held within 180 days from the filing of the application or petition, unless the time limit is waived by the applicant or petitioner in writing. In the discretion of the chair of the Commission, the hearing shall be conducted before the Commission or a panel appointed by the chair. At the hearing, the applicant or petitioner may:

1. appear personally and be heard;
2. be represented by counsel;
3. call and examine witnesses;
4. offer exhibits; and
5. cross-examine witnesses.

f. At the hearing, the Commission may call witnesses, offer exhibits, and examine the applicant or petitioner and witnesses.

g. The burden of proof shall be upon the applicant or petitioner to establish by clear, cogent, and convincing evidence that:

1. the applicant or petitioner has (i) rehabilitated his or her character; (ii) addressed and resolved any conditions that led to his or her denial of certification or decertification; (iii) completed additional training in mediation theory and practice, studied program rules, the Standards of Professional Conduct for Mediators, and ethics to ensure his or her competency as a mediator; and/or (iv) taken steps to address and resolve any other matter which led to the applicant or petitioner's denial of certification or decertification;
2. the applicant or petitioner, if a mediator training program, has corrected any deficiencies as required by enabling legislation, program rules, or Commission policies, and has addressed and resolved any issues related to the qualifications or character issues of any persons affiliated with the program;
3. the petitioner's reinstatement or applicant's certification will not be detrimental to the Mediated Settlement Conference, Family Financial Settlement, Clerk Mediation, District Criminal Court Mediation programs, or to other programs, the Commission, the courts, or the public; and
4. the applicant or petitioner has completed any paperwork required for certification or reinstatement, including, but not limited to, the

completion of a new application and execution of a release to conduct a background check, and has paid any required reinstatement and/or certification fees.

h. If the applicant or petitioner has established that the conditions set forth in subsection (e)(17)(g) of this rule have been met by clear, cogent, and convincing evidence, then the Commission shall certify or reinstate the applicant or petitioner as a certified mediator or mediator training program. Certification or reinstatement may be conditioned upon the completion of any reasonable condition set forth in subsection (e)(13)(c) of this rule.

i. The Commission or panel shall set forth its decision to certify or reinstate an applicant or petitioner or to deny certification or reinstatement in writing, making findings of fact and conclusions of law. A copy of the decision shall be sent by Certified Mail, return receipt requested, within sixty days from the date of the hearing, and such service shall be deemed sufficient for purposes of these rules. A copy of the decision shall also be sent to the applicant or petitioner through the U.S. Postal Service by First-Class Mail.

j. If a new application for certification or petition seeking reinstatement is denied, then the applicant or petitioner may not apply again under subsection (e)(17) of this rule until two years have elapsed from the date of the decision denying certification or reinstatement.

k. The Superior Court, Wake County, shall have jurisdiction over appeals of Commission decisions to deny certification or reinstatement under subsection (e)(17) of this rule. A decision denying certification or reinstatement under this section shall be reviewable upon appeal, and the entire record, as submitted, shall be reviewed to determine whether the decision is supported by substantial evidence. Notice of appeal shall be filed in the Superior Court, Wake County, no later than thirty days from the date of the actual delivery to the applicant or petitioner of the decision, or no later than thirty

days from the last attempted delivery by the U.S. Postal Service.

Rule 10. The Mediator Certification and Training Committee

(a) **Appointment of the Mediator Certification and Training Committee**. The Commission's chair shall appoint a standing committee entitled the Mediator Certification and Training Committee to review the matters set forth in subsection (b) of this rule.

(b) **Matters to Be Considered by the Mediator Certification and Training Committee**. The Mediator Certification and Training Committee shall review and consider matters arising under this subsection.

(1) Commission staff may raise with the Mediator Certification and Training Committee's chair matters relating to the issuance of provisional pre-training approvals and that pertain to an applicant's education, work experience, training, or any other requirement for mediator certification unrelated to moral character, conduct, or fitness to practice, including a request that the chair review a staff determination not to issue a provisional pre-training approval.

(2) Commission staff may raise with the Mediator Certification and Training Committee's chair or the full committee matters that relate to the education, work experience, training, or other qualifications of an applicant for mediator certification unrelated to moral character, conduct, or fitness to practice. Appeals of staff determinations to deny an application based on a deficiency in the applicant's education, work experience, and/or training, or his or her failure to meet other requirements for certification unrelated to moral character, conduct, or fitness to practice, shall be brought before the full committee.

(3) Commission staff may raise with the Mediator Certification and Training Committee's chair or the full committee matters that pertain to applications for mediator training program certification or certification renewal that are unrelated to the moral character, conduct, or fitness to practice of training program personnel. Appeals of staff decisions to deny an application for mediator training program certification or certification renewal shall be brought before the full committee.

(c) **Commission Staff Review of Qualifications**.

(1) **Review of Provisional Pre-training Approvals**. Commission staff shall review requests for the issuance

of provisional pre training approvals, seeking guidance from the Mediator Certification and Training Committee chair, as necessary, and shall issue approvals in instances where the person seeking the approval appears to meet all education, work experience, and other requirements established for mediator certification by program rules and Commission policies, except that any matters relating to the moral character, conduct, or fitness to practice of the person requesting the approval shall be put before the Grievance and Disciplinary Committee or its chair under Rule 9. Staff may contact those requesting approvals, any third party or entity with relevant information about the requesting person, and may consider any other information acquired during the review process that bears on the requesting person's qualifications. If, after review, the chair determines that the person requesting the provisional pre-training approval does not meet the requisite criteria for certification established by program rules and Commission policies, then the chair shall instruct staff not to issue the pre-training approval. That determination shall be final and is not subject to appeal by the person requesting the provisional pre-training approval.

(2) **Review of Information Obtained During the Mediator Certification Process**. Commission staff shall review all applications for mediator certification to determine whether the applicant meets the qualifications for certification unrelated to moral character, conduct, or fitness to practice set forth in program rules adopted by the Supreme Court for mediated settlement conferences or mediation programs under the jurisdiction of the Commission and any policies adopted by the Commission for the purpose of implementing those rules. Staff may contact an applicant to request additional information, may contact third parties or entities with relevant information about the applicant, and may consider any other information acquired during the review process that bears on the applicant's eligibility for certification.

(3) **Review of Mediator Training Program Certification Applications and Certification Renewal Applications**. Commission staff shall review all mediator training program applications for certification and certification renewal, including reviewing mediator training program agendas, handouts, role plays, and trainer qualifications, to ensure compliance with program rules and

Commission policies relating to mediator training programs, except that any matters relating to the moral character, conduct, or fitness to practice of training program personnel shall be put before the Grievance and Disciplinary Committee or its chair under Rule 9. Staff may seek clarification and additional information from training program personnel and training program registrants and attendees, as necessary.

(d) **Mediator Certification and Training Committee Review**.

(1) **Duty to Review**. The Mediator Certification and Training Committee shall review all matters brought before it by Commission staff under the provisions of subsections (b)(2) and (b)(3) of this rule. The chair may, in his or her discretion, appoint members of the committee to serve on a subcommittee to review a particular matter brought to the committee by staff. The chair or his or her designee may issue subpoenas for the attendance of witnesses and for the production of books, papers, materials, or other documentary evidence deemed necessary to any such review. The chair or designee may contact the following persons and entities for information concerning an applicant for mediator certification, mediator training program certification, or mediator training program certification renewal:

a. All references, employers, colleges, professional licensing or certification bodies, and other individuals or entities cited in applications and any additional persons or entities identified by Commission staff during the course of its review as having relevant information about the qualifications of an applicant for mediator certification, mediator training program certification, or mediator training program certification renewal.

b. Personnel affiliated with an applicant for mediator training program certification or mediator training program certification renewal, and those who registered for or have completed the training program.

All information in Commission files pertaining to requests for provisional pre-training approvals, initial certification applications of a mediator or mediator training program, or renewals of such certifications shall be confidential, except as provided in N.C.G.S. § 7A-38.2(h) or these rules.

(2) **Probable Cause Determination**. The members of the Mediator Certification and Training Committee who are eligible to vote shall deliberate to determine whether probable cause exists to believe that an applicant for mediator certification, mediator training program certification, or mediator training program certification renewal:

a. does not meet the qualifications for mediator certification unrelated to moral character, conduct, or fitness to practice as set forth in program rules adopted by the Supreme Court for mediated settlement conferences or mediation programs under the jurisdiction of the Commission or the policies adopted by the Commission for the purpose of implementing those rules; or

b. does not meet the requirements for mediator training program certification or mediator training program certification renewal unrelated to moral character, conduct, or fitness to practice as set forth in program rules adopted by the Supreme Court for mediated settlement conferences or mediation programs under the jurisdiction of the Commission or the policies adopted by the Commission for the purpose of implementing those rules.

If probable cause is found, then the application shall be denied.

(3) **Authority of Mediator Certification and Training Committee to Deny an Application for Certification or Mediator Training Program Certification Renewal**.

a. If a majority of the Mediator Certification and Training Committee members who are reviewing a matter and eligible to vote find no probable cause under subsection (d)(2) of this rule, then Commission staff shall be instructed to certify the applicant for mediator certification or to certify or recertify the mediator training program.

b. If a majority of the Mediator Certification and Training Committee members reviewing a matter and eligible to vote finds probable cause under subsection (d)(2) of this rule, then the committee shall deny the application for mediator certification or mediator training program certification or mediator training program certification renewal. The

committee's determination to deny the application shall be in writing, shall set forth the deficiencies the committee found in the application, and shall be forwarded to the applicant. Notification of the determination shall be by Certified Mail, return receipt requested, and such service shall be deemed sufficient for purposes of these rules. A copy of the notice shall also be sent to the applicant through the U.S. Postal Service by First-Class Mail.

c. If the Mediator Certification and Training Committee denies an application for mediator certification, mediator training program certification, or mediator training program certification renewal, then the applicant may appeal the denial to the Commission within thirty days from the date of the actual delivery of the notice of denial to the applicant or within thirty days from the date of the last attempted delivery by the U.S. Postal Service. Notification of an appeal must be in writing and directed to the Commission's office. If no appeal is filed within thirty days as set out herein, then the applicant shall be deemed to have accepted the committee's findings and determination.

(e) **Appeal of the Denial of Application for Mediator Certification, Mediator Training Program Certification, or Mediator Training Program Certification Renewal to the Commission**.

(1) **The Commission Shall Meet to Consider Appeals**. In the discretion of the Commission's chair, an appeal by an applicant to the Commission of a Mediator Certification and Training Committee determination under subsection (d)(2) of this rule shall be heard either by (i) a five-member panel of Commission members chosen by the chair or his or her designee, or (ii) the members of the full Commission. Any members of the committee who participated in issuing the committee's determination shall be recused and shall not participate in the hearing. Under Rule 3(c), members of the Commission shall recuse themselves from hearing the matter when they cannot act impartially. No matter shall be heard and decided by less than three Commission members.

(2) **Conduct of the Hearing**.

a. At least thirty days prior to the hearing before the Commission or panel, Commission staff shall

forward to the appealing party, special counsel to the Commission, if appointed, and members of the Commission or panel who will hear the matter, a copy of all documents considered by the Mediator Certification and Training Committee and the names of the members of the Commission or panel who will hear the matter. Any written challenge questioning the neutrality of a member of the Commission or panel shall be directed to and decided by the Commission's chair or designee. A written challenge shall be filed with the Commission no later than seven days from the date the person filing the challenge received notice of the members who will hear the appeal.

b. Hearings conducted by the Commission or a panel under this rule shall be de novo.

c. If, in the discretion of the Commission's chair, a panel is empaneled to hear the appeal, then the Commission's chair or designee shall appoint one of the members of the panel to serve as the presiding officer at the hearing before the panel. The Commission's chair or designee shall serve as the presiding officer at a hearing before the full Commission. The presiding officer shall have such jurisdiction and powers as are necessary to conduct a proper and efficient hearing and disposition of the matter on appeal. The presiding officer may administer oaths and may issue subpoenas for the attendance of witnesses and the production of books, papers, or other documentary evidence.

d. Nothing herein shall restrict the chair of the Commission from serving on a panel or serving as its presiding officer at any hearing held under the provisions of subsection (e) of this rule.

e. Special counsel supplied by the North Carolina Attorney General, at the request of the Commission or otherwise employed by the Commission, may present evidence in support of the denial of certification or recertification.

f. The Commission or panel, through its counsel, and the applicant or the applicant's representative may present evidence in the form of sworn testimony

and/or written documents. The Commission or panel, through its counsel, and the applicant may cross-examine any witness called to testify at the hearing. The Rules of Evidence shall not apply, except as to privilege, but shall be considered as a guide toward a full and fair development of the facts. Commission or panel members may question any witness called to testify at the hearing. The Commission or panel shall consider all evidence presented and give the evidence appropriate weight and effect.

g. Hearings shall be conducted in private unless the applicant requests a public hearing.

h. An applicant and any witnesses or others identified as having relevant information about the matter may appear at the hearing with or without counsel.

i. In the event that the applicant fails to appear without good cause, the Commission or panel shall proceed to hear from the witnesses who are present and make a determination based on the evidence presented at the proceeding.

j. Proceedings before the Commission or panel shall be conducted informally, but with decorum.

(3) **Date of the Hearing**. An appeal of any determination by the Mediator Certification and Training Committee to deny an application for mediator certification, mediator training program certification, or mediator training program certification renewal shall be heard by the Commission no later than 180 days from the date the notice of appeal is filed with the Commission, unless waived in writing by the applicant.

(4) **Notice of the Hearing**. The Commission's office shall serve on all parties by Certified Mail, return receipt requested, notice of the date, time, and place of the hearing no later than sixty days prior to the hearing, and such service shall be deemed sufficient for the purposes of these rules. A copy of the hearing notice shall also be sent through the U.S. Postal Service by First-Class Mail.

(5) **Ex Parte Communications**. With the exception of Commission staff, no person shall have any ex parte communication with a member of the Commission concerning

the subject matter of the appeal. Communications regarding scheduling matters shall be directed to staff.

(6) **Attendance**. The presiding officer may, in his or her discretion, permit an attorney to represent a party by telephone or through video conference or allow witnesses to testify by telephone or through video conference, with such limitations and conditions as are just and reasonable. If an attorney or witness wishes to appear by telephone or video conference, then he or she shall notify Commission staff at least twenty days prior to the proceeding. At least five days prior to the proceeding, staff must be provided with the contact information of those who will participate by telephone or video conference.

(7) **Witnesses**. The presiding officer shall exercise his or her discretion with respect to the attendance and number of witnesses who appear, voluntarily or involuntarily, for the purpose of ensuring the orderly conduct of the proceeding. At least ten days prior to the hearing, each party shall forward to the Commission's office and to all other parties the names of all witnesses who each intends to call to testify.

(8) **Rights of the Applicant at the Hearing**. At the hearing, the applicant may:

a. appear personally and be heard;

b. be represented by counsel;

c. call and examine witnesses;

d. offer exhibits; and

e. cross-examine witnesses.

(9) **Transcript**. The Commission shall retain a court reporter to keep a record of the proceeding. Any applicant who wishes to obtain a transcript of the record may do so at his or her own expense by contacting the court reporter directly. The only official record of the proceeding shall be the one made by the court reporter retained by the Commission. Copies of a tape, noncertified transcript, or record made by a court reporter retained by a party are not part of the official record.

(10) **Commission Deliberation**. The members of the Commission or panel shall deliberate to determine whether clear, cogent, and convincing evidence exists to believe that the education, work experience, training, or

other qualifications of an applicant for mediator certification unrelated to moral character, conduct, or fitness to practice, fail to meet the requirements for certification set forth in program rules and/or Commission policies, or whether the qualifications of a mediator training program seeking certification or certification renewal fail to meet any of the requirements for certification or certification renewal unrelated to the moral character, conduct, or fitness to practice of mediator training program personnel set forth in program rules and/or Commission policies.

(11) **Commission Decision**. After the hearing, a majority of the Commission members hearing the appeal or the panel may find that:

a. there is not clear, cogent, and convincing evidence to support a denial of certification, and instruct Commission staff to certify the applicant for mediator certification or to certify or recertify the applicant for mediator training program certification; or

b. there is clear, cogent, and convincing evidence that grounds exist to deny the application for mediator certification or mediator training program certification or mediator training program certification renewal.

The Commission or panel shall set forth its findings of fact, conclusions of law, and decision to deny certification or certification renewal in writing and serve its decision on the applicant within sixty days from the date the hearing is concluded. A copy of the decision shall be sent by Certified Mail, return receipt requested, and such service shall be deemed sufficient for purposes of these rules. A copy of the decision shall also be sent through the U.S. Postal Service by First-Class Mail.

(12) **Appeals**. The Superior Court, Wake County, shall have jurisdiction over appeals of Commission or panel decisions denying an application for certification of a mediator or mediator training program or mediator training program renewal. The decision denying certification or renewal of mediator training program certification under this rule shall be reviewable upon appeal if the entire record, as submitted, is reviewed to determine whether the decision is supported by substantial evidence. A notice of appeal shall be filed in the Superior

Court, Wake County, no later than thirty days from the date of the actual delivery to the applicant of the decision denying certification or mediator training program certification renewal, or within thirty days from the last attempted delivery by the U.S. Postal Service.

(13) **New Application Following Denial of Initial Application for Certification or Mediator Training Program Certification Renewal**. An applicant whose application for mediator or mediator training program certification has been denied, or a mediator training program whose application for certification renewal has been denied, may reapply for certification under this rule.

Except as otherwise provided by the Mediator Certification and Training Committee, Commission, or a panel of the Commission, no new application for mediator certification following a denial may be tendered within two years of the date of the denial of the application for mediator certification. A new application for mediator training program certification may be tendered at any time the applicant believes that the program has met the qualifications for mediator training program certification.

a. A new application following a denial shall be made in writing, verified by the applicant, and filed with the Commission's office.

b. The new application following a denial shall contain:

1. the name and address of the applicant;

2. a concise statement of the reasons upon which the denial was based;

3. a concise statement of facts alleged to meet respondent's burden of proof as set forth in subsection (e)(13)(g) of this rule; and

4. a statement consenting to a criminal background check, signed by the applicant or petitioner; or, if the applicant or petitioner is a mediator training program, by the trainers or instructors affiliated with the program.

c. The new application for certification may also contain a request for a hearing on the matter to consider any additional evidence that the applicant wishes to submit. An application from a mediator training program for certification or certification

renewal may contain a request for a hearing on the matter to consider any additional evidence regarding the effectiveness of the program and/or the qualifications of its personnel.

d. Commission staff shall refer the new application to the Commission for review. In the discretion of the Commission's chair, the chair or designee may (i) appoint a five-member panel of Commission members to review the matter, or (ii) put the matter before the Commission for review. The panel shall not include any members of the Commission who were involved in a prior determination involving the applicant or petitioner. Members of the Commission shall recuse themselves from reviewing any matter if they cannot act impartially. Any challenges questioning the neutrality of a member reviewing the matter shall be decided by the Commission's chair or designee. No matter shall be heard and decided by less than three Commission members.

e. If the applicant does not request a hearing under subsection (e)(13)(c) of this rule, then the Commission or panel shall review the application and shall decide whether to grant or deny the new application for mediator certification or mediator training program certification or certification renewal after denial within ninety days from the filing of the new application. That decision shall be final.

If the applicant requests a hearing, then it shall be held within 180 days from the filing of the new application, unless the time limit is waived by the applicant in writing. The Commission shall conduct the hearing consistent with subsection (e)(2) of this rule. In the discretion of the chair of the Commission, the hearing shall be conducted before the Commission or a panel appointed by the chair. At the hearing, the applicant may:

1. appear personally and be heard;
2. be represented by counsel;
3. call and examine witnesses;
4. offer exhibits; and
5. cross-examine witnesses.

f. At the hearing, the Commission may call witnesses, offer exhibits, and examine the applicant and witnesses.

g. The burden of proof shall be upon the applicant to establish by clear, cogent, and convincing evidence that:

1. the applicant has satisfied the qualifications that led to the denial;

2. the applicant has completed any paperwork required for certification, including, but not limited to, the completion of an approved application form and execution of a release to conduct a background check, and paid any required certification fees; and

3. the applicant, if a mediator training program, has corrected any deficiencies as required by enabling legislation, program rules, or Commission policies, and has addressed and resolved any issues related to the qualifications of any persons affiliated with the program unrelated to moral character, conduct, or fitness to practice.

h. If the applicant has established that the conditions set forth in subsection (e)(13)(g) of this rule have been met by clear, cogent, and convincing evidence, and is entitled to have the application approved, then the Commission shall certify the applicant.

i. The Commission or panel shall set forth its decision to certify the applicant or to deny certification in writing, making findings of fact and conclusions of law. The decision shall be sent by Certified Mail, return receipt requested, within sixty days from the date of the hearing. Such service shall be deemed sufficient for purposes of these rules. A copy of the decision shall also be sent through the U.S. Postal Service by First-Class Mail.

j. The Superior Court, Wake County, shall have jurisdiction over appeals of Commission decisions to deny certification or certification renewal under subsection (e)(13) of this rule. A decision denying certification or certification renewal under

this section shall be reviewable upon appeal, and the entire record, as submitted, shall be reviewed to determine whether the decision is supported by substantial evidence. Notice of appeal shall be filed in the Superior Court, Wake County, no later than thirty days from the date of the actual delivery of the decision to the applicant, or thirty days from the date of the last attempted delivery by the U.S. Postal Service. A copy of the decision shall also be sent to applicant through the U.S. Postal Service by First-Class Mail.

Rule 11. Internal Operating Procedures

(a) The Commission may adopt and publish internal operating procedures and policies for the conduct of Commission business.

(b) The Commission's procedures and policies may be changed as needed.

* * *

ORDER ADOPTING THE STANDARDS OF PROFESSIONAL CONDUCT FOR MEDIATORS

Pursuant to subsection 7A-38.2(a) of the General Statutes of North Carolina, the Court hereby adopts the Standards of Professional Conduct for Mediators, which appear on the following pages. These standards supersede the Revised Standards of Professional Conduct for Mediators, published at 367 N.C. 1053–62.

The Standards of Professional Conduct for Mediators become effective on 1 March 2020.

This order shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 23rd day of January, 2020.

Mark A. Davis

For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 23rd day of January, 2020.

Amy L. Funderburk

AMY L. FUNDERBURK
Clerk of the Supreme Court

Standards of Professional Conduct for Mediators

Preamble

The Standards of Professional Conduct for Mediators apply to (i) all mediators who are certified by the North Carolina Dispute Resolution Commission (Commission); and (ii) all mediators who are not certified by the Commission, but are conducting court-ordered mediations in the context of a program or process governed by statutes that provide for the Commission to regulate the conduct of mediators participating in the program or process.

These standards are intended to instill and promote public confidence in the mediation process and to provide minimum standards for the conduct of mediators. As with other forms of dispute resolution, mediation must be built upon public understanding and confidence. Persons serving as mediators are responsible to the parties, the public, and the courts to conduct themselves in a manner that will merit that confidence. (*See* Rule 7 of the Rules of the Dispute Resolution Commission.)

It is the mediator's role to facilitate communication and understanding among the parties and to assist the parties in reaching an agreement. The mediator should aid the parties in identifying and discussing issues and in exploring options for settlement. The mediator should not, however, render a decision on the issue in dispute. In mediation, the ultimate decision whether, and on what terms, to resolve the dispute belongs to the parties alone.

Standard 1. Competency

A mediator shall maintain professional competency in mediation skills and, where a mediator lacks the skills necessary for a particular case, the mediator shall decline to serve or withdraw from serving.

(a) A mediator's most important qualification is the mediator's competence in the procedural aspects of facilitating the resolution of a dispute, rather than the mediator's technical knowledge relating to the subject of the dispute. Therefore, a mediator shall obtain necessary skills and substantive training appropriate to the mediator's areas of practice and advance those skills on an ongoing basis.

(b) If a mediator determines that a lack of technical knowledge impairs or is likely to impair the mediator's effectiveness, then the mediator shall notify the parties and shall withdraw from mediating the dispute if requested by any party.

(c) Beyond disclosure under subsection (b) of this standard, a mediator is obligated to exercise judgment as to whether the mediator's skills or expertise are sufficient given the demands of the case and, if they are not, to decline from serving or withdraw.

Standard 2. Impartiality

A mediator shall, in word and action, maintain impartiality toward the parties and on the issue in dispute.

(a) Impartiality means an absence of prejudice or bias, in word and action, and a commitment to aid all parties, as opposed to a single party, in exploring the possibilities for resolution.

(b) As early as practical, and no later than the beginning of the first mediation session, the mediator shall fully disclose of any known relationship with a party or a party's counsel that may affect, or give the appearance of affecting, the mediator's impartiality.

(c) The mediator shall decline to serve, or shall withdraw from serving, if:

(1) a party objects to the mediator serving on grounds of lack of impartiality and, after discussion, the party continues to object; or

(2) the mediator determines that he or she cannot serve impartially.

Standard 3. Confidentiality

A mediator shall, subject to exceptions set forth below, maintain the confidentiality of all information obtained within the mediation process.

(a) A mediator shall not disclose to any nonparticipant, directly or indirectly, any information communicated to the mediator by a participant within the mediation process, whether the information is obtained before, during, or after the mediated settlement conference. A mediator's filing of a copy of an agreement reached in mediation with the appropriate court, under a statute that mandates such filing, shall not be considered to be a violation of this subsection.

(b) A mediator shall not disclose to any participant, directly or indirectly, any information communicated to the mediator in confidence by any other participant in the mediation process, whether the information is obtained before, during, or after the mediated settlement conference, unless the other participant gives the mediator permission to do so. A mediator may encourage a participant to permit disclosure but, absent permission, the mediator shall not disclose the information.

(c) A mediator shall not disclose to court officials or staff any information communicated to the mediator by a participant within the mediation process, whether before, during, or after the mediated settlement conference, including correspondence or communications regarding scheduling or attendance, except as required to complete a report of mediator form; provided, however, that when seeking to collect a fee for services, the mediator may share correspondence or communications from a participant relating to the fees of the mediator. Report of mediator forms are available on the North Carolina Administrative Office of the Court's website at https://www.nccourts.gov.

(d) Notwithstanding the confidentiality provisions set forth in subsections (a), (b), and (c) of this standard, a mediator may report otherwise confidential conduct or statements made before, during, or after mediation in the following circumstances:

(1) If a mediator believes that communicating certain procedural matters to court officials or staff will aid the mediation, then, with the consent of the parties to the mediation, the mediator may do so. In making a permitted disclosure, a mediator shall refrain from expressing his or her personal opinion about a participant or any aspect of the case to court officials or staff.

(2) If a statute requires or permits a mediator to testify, give an affidavit, or tender a copy of an agreement reached in mediation to the official designated by the statute, then the mediator may do so.

If, under the Rules for Settlement Procedures in District Court Family Financial Cases or the Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions, a hearing is held on a motion for sanctions for failure to attend a mediated settlement conference, or for failure to pay the mediator's fee, and the mediator who mediated the dispute testifies, either as the movant or under a subpoena, then the mediator shall limit his or her testimony to facts relevant to a decision about the sanction sought and shall not testify about statements made by a participant that are not relevant to that decision.

(3) If a mediator is subpoenaed and ordered to testify or produce evidence in a criminal action or proceeding as provided in N.C.G.S. § 7A-38.1(1), N.C.G.S. § 7A-38.4A(j), and N.C.G.S. § 7A-38.3B(g), then the mediator may do so.

(4) If public safety is at issue, then a mediator may disclose otherwise confidential information to participants, non-participants, law enforcement personnel, or other persons potentially affected by the harm, if:

a. a party to, or a participant in, the mediation has communicated to the mediator a threat of serious bodily harm or death to any person, and the mediator has reason to believe the party has the intent and ability to act on the threat;

b. a party to, or a participant in, the mediation has communicated to the mediator a threat of significant damage to real or personal property, and the mediator has reason to believe the party has the intent and ability to act on the threat; or

c. a party or other participant's conduct during the mediation results in direct bodily injury or death to a person.

(5) If a party to, or a participant in, a mediation has filed a complaint with either the Commission or the North Carolina State Bar regarding a mediator's professional conduct, moral character, or fitness to practice as a mediator, then the mediator may reveal otherwise confidential information for the purpose of defending himself or herself against the complaint.

(6) If a party to, or a participant in, a mediation has filed a lawsuit against a mediator for damages or other relief regarding the mediator's professional conduct, moral character, or fitness to practice as a mediator, then the mediator may reveal otherwise confidential information for the purpose of defending himself or herself in the action.

(7) With the permission of all parties, a mediator may disclose otherwise confidential information to an attorney who now represents a party in a case previously mediated by the mediator and in which no settlement was reached. The disclosure shall be intended to help the newly involved attorney understand any offers extended during the mediation process and any impediments to settlement. A mediator who discloses otherwise confidential information under this subsection shall take great care, especially if some time has passed, to ensure that their recall of the discussion is clear, that the information

is presented in an unbiased manner, and that no confidential information is revealed.

(8) If a mediator is an attorney licensed by the North Carolina State Bar and another attorney makes statements or engages in conduct that is reportable under subsection (d)(3) of this standard, then the mediator shall report the statements or conduct to either the North Carolina State Bar or the court having jurisdiction over the matter, in accordance with Rule 8.3(e) of the North Carolina Rules of Professional Conduct.

(9) If a mediator concludes that, as a matter of safety, the mediated settlement conference should be held in a secure location, such as the courthouse, then the mediator may seek the assistance of court officials or staff in securing a location, so long as the specific circumstances of the parties' dispute are not identifiable.

(10) If a mediator or mediator-observer witnesses concerning behavior of an attorney during a mediation, then that behavior may be reported to the North Carolina Lawyer Assistance Program for the purpose of providing assistance to the attorney for alcohol or substance abuse.

In making a permitted disclosure under this standard, a mediator should make every effort to protect the confidentiality of noncomplaining parties or participants in the mediation, refrain from expressing his or her personal opinion about a participant, and avoid disclosing the identities of the participants or the specific circumstances of the parties' dispute.

(e) "Court officials or staff," as used in this standard, includes court officials or staff of North Carolina state and federal courts, state and federal administrative agencies, and community mediation centers.

(f) Nothing in this standard prohibits the use of information obtained in a mediation for instructional purposes or for the purpose of evaluating or monitoring the performance of a mediator, mediation organization, or dispute resolution program, so long as the parties or the specific circumstances of the parties' controversy are not identifiable.

Standard 4. Consent

A mediator shall make reasonable efforts to ensure that each party understands the mediation process, the role of the mediator, and the party's options within the mediation process.

(a) A mediator shall discuss with the participants the rules and procedures pertaining to the mediation process and shall inform the parties of such matters as applicable rules require.

(b) A mediator shall not exert undue pressure on a participant, whether to participate in mediation or to accept a settlement; nevertheless, a mediator shall encourage the parties to consider both the benefits of participation and settlement and the costs of withdrawal and impasse.

(c) If a party appears to have difficulty comprehending the mediation process, issue, or settlement options, or appears to have difficulty participating in a mediation, then a mediator shall explore the circumstances and potential accommodations, modifications, or adjustments that would facilitate the party's ability to comprehend, participate, and exercise self-determination. If the mediator determines that the party cannot meaningfully participate in the mediation, then the mediator shall recess or discontinue the mediation. Before discontinuing the mediation, the mediator shall consider the context and circumstances of the mediation, including the subject matter of the dispute, availability of support persons for the party, and whether the party is represented by counsel.

(d) In appropriate circumstances, a mediator shall inform the parties about the importance of seeking legal, financial, tax, or other professional advice before, during, or after the mediation process.

Standard 5. Self-Determination

A mediator shall respect and encourage self-determination by the parties in their decision whether, and on what terms, to resolve their dispute, and shall refrain from being directive or judgmental regarding the issue in dispute and the options for settlement.

(a) A mediator is obligated to leave to the parties the full responsibility for deciding whether, and on what terms, to resolve their dispute. The mediator may assist a party in making an informed and thoughtful decision, but shall not impose his or her judgment or opinion concerning any aspect of the mediation on the party.

(b) A mediator may raise questions for the participants to consider regarding their perception of the dispute, as well as the acceptability of proposed options for settlement and their impact on third parties. Furthermore, a mediator may suggest options for settlement in addition to those conceived of by the parties.

(c) A mediator shall not impose his or her opinion about the merits of the dispute or about the acceptability of any proposed option for

settlement. A mediator should refrain from giving his or her opinion about the dispute and options for settlement, even when the mediator is requested to do so by a party or attorney. Instead, a mediator should help that party utilize the party's own resources to evaluate the dispute and the options for settlement.

This subsection prohibits a mediator from imposing his or her opinion, advice, or counsel upon a party or attorney. This subsection does not prohibit a mediator from expressing his or her opinion as a last resort to a party or attorney who requests it, as long as the mediator has already helped that party utilize the party's own resources to evaluate the dispute and the options for settlement.

(d) Subject to Standard 4(d), if a party to a mediation declines to consult with independent counsel or an expert after a mediator has raised the consultation as an option, then the mediator shall permit the mediation to go forward according to the parties' wishes.

(e) If, in a mediator's judgment, the integrity of the mediation process has been compromised by, for example, the inability or unwillingness of a party to participate meaningfully, the inequality of bargaining power or ability, the unfairness resulting from nondisclosure or fraud by a participant, or other circumstances likely to lead to a grossly unjust result, then the mediator shall inform the parties of his or her concern. Consistent with the confidentiality provisions in Standard 3, the mediator may discuss with the parties the source of his or her concern. The mediator may choose to discontinue the mediation in such circumstances but shall not violate his or her obligation of confidentiality.

Standard 6. Legal and Other Professional Advice Prohibited

A mediator shall limit himself or herself solely to the role of mediator and shall not give legal or other professional advice during the mediation.

A mediator may provide information that the mediator is qualified by training or experience to provide, but only if the mediator can do so consistent with these standards. A mediator may respond to a party's request for the mediator's opinion on the merits of the case, or on the suitability of settlement proposals, in accordance with Standard 5(c).

Standard 7. Conflicts of Interest

A mediator shall not allow the mediator's personal interest to interfere with his or her primary obligation to impartially serve the parties to the dispute.

(a) A mediator shall place the interests of the parties above the interests of any court or agency which has referred the case, if such interests are in conflict.

(b) If a party is represented or advised by a professional advocate or counselor, then a mediator shall place the interest of the party over the mediator's own interest in maintaining cordial relations with the professional advocate or counselor, if such interests are in conflict.

(c) A mediator who is an attorney, therapist, or other professional, and the mediator's professional partners or co-shareholders, shall not advise, counsel, or represent any of the parties in future matters concerning the subject of the dispute, an action closely related to the dispute, or an outgrowth of the dispute when the mediator or his or her staff has engaged in a substantive conversation with a party to the dispute. A substantive conversation is one that goes beyond a discussion of the general issue in dispute, the identity of parties or participants, and scheduling or administrative issues. Any disclosure that a party might expect the mediator to hold confidential under Standard 3 is a substantive conversation.

A mediator who is an attorney, therapist, or other professional may not mediate the dispute when the mediator, the mediator's professional partners, or the mediator's co-shareholders have advised, counseled, or represented any of the parties in any matter concerning the subject of the dispute, in any action closely related to the dispute, in any preceding issue in the dispute, or in any outgrowth of the dispute.

(d) A mediator shall not charge a contingent fee, or a fee based on the outcome of the mediation.

(e) A mediator shall not use information obtained, or relationships formed, during a mediation for personal gain or advantage.

(f) A mediator shall not knowingly contract for mediation services that cannot be delivered or completed in a timely manner or as directed by the court.

(g) A mediator shall not prolong a mediation for the purpose of charging a higher fee.

(h) A mediator shall not give any commission, rebate, or other monetary or non-monetary form of consideration to a party, or representative of a party, in return for a referral or due to an expectation of a referral of clients for mediation services.

A mediator should neither give nor accept any gift, favor, loan, or other item of value that raises a question as to the mediator's impartiality. However, a mediator may give or receive de minimis offerings such as sodas, cookies, snacks, or lunches served to those attending a mediation conducted by the mediator, that are intended to further the mediation or show respect for cultural norms.

Standard 8. Protecting the Integrity of the Mediation Process

A mediator shall encourage mutual respect between the parties and shall take reasonable steps, subject to the principle of self-determination, to limit abuses of the mediation process.

(a) A mediator shall make reasonable efforts to (i) ensure that a balanced discussion takes place during the mediation, (ii) prevent manipulation or intimidation by either party, and (iii) ensure that each party understands and respects the concerns and the position of the other party—even if they cannot agree.

(b) If a mediator believes that the statements or actions of a participant—including those of an attorney who the mediator believes is engaging in, or has engaged in, professional misconduct—jeopardize or will jeopardize the integrity of the mediation process, then the mediator shall attempt to persuade the participant to cease the participant's behavior and take remedial action. If the mediator is unsuccessful in this effort, then the mediator shall take appropriate steps including, but not limited to, postponing, withdrawing from, or terminating the mediation. If an attorney's statements or conduct are reportable under Standard 3(d)(8), then the mediator shall report the attorney to either the North Carolina State Bar or the court having jurisdiction over the matter, in accordance with Rule 8.3(e) of the North Carolina Rules of Professional Conduct.

* * *

RULES FOR MEDIATED SETTLEMENT CONFERENCES AND OTHER SETTLEMENT PROCEDURES IN SUPERIOR COURT CIVIL ACTIONS

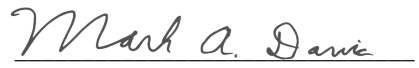
ORDER ADOPTING THE RULES FOR MEDIATED SETTLEMENT CONFERENCES AND OTHER SETTLEMENT PROCEDURES IN SUPERIOR COURT CIVIL ACTIONS

Pursuant to subsection 7A-38.1(c) of the General Statutes of North Carolina, the Court hereby adopts the Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions, which appear on the following pages. These rules supersede the Revised Rules Implementing Statewide Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions, published at 367 N.C. 1010–52.

The Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions become effective on 1 March 2020.

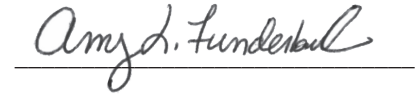
This order shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 23rd day of January, 2020.



For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 23rd day of January, 2020.



AMY L. FUNDERBURK
Clerk of the Supreme Court

Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions

Rule 1. Initiating Settlement Events

(a) **Purposes of Mandatory Settlement Procedures**. These rules are promulgated under N.C.G.S. § 7A-38.1 to implement a system of settlement events, which are designed to focus the parties' attention on settlement, rather than on trial preparation, and to provide a structured opportunity for settlement negotiations to take place. Nothing in these rules is intended to limit or prevent the parties from engaging in settlement procedures voluntarily, either prior to, or after, those ordered by the court under these rules.

(b) **Duty of Counsel to Consult with Clients and Opposing Counsel Concerning Settlement Procedures**. In furtherance of the purposes set out in subsection (a) of this rule, upon being retained to represent any party to a superior court civil action, counsel shall advise his or her client regarding the settlement procedures approved by these rules, and shall attempt to reach an agreement with opposing counsel on an appropriate settlement procedure for the action.

(c) **Initiating the Mediated Settlement Conference by Court Order.**

(1) **Order of the Senior Resident Superior Court Judge**. In all civil actions, except those actions in which a party is seeking the issuance of an extraordinary writ or is appealing the revocation of a motor vehicle operator's license, the senior resident superior court judge of any judicial district shall, by written order, require all persons and entities identified in Rule 4 to attend a pretrial mediated settlement conference. The judge may withdraw his or her order upon motion of a party under subsection (c)(6) of this rule only for good cause shown.

(2) **Motion to Authorize the Use of Other Settlement Procedures**. The parties may move the senior resident superior court judge to authorize the use of another settlement procedure allowed by these rules, or by local rule, in lieu of a mediated settlement conference, as provided in N.C.G.S. § 7A-38.1(i). The party requesting the authorization shall file a Motion for an Order to Use Settlement Procedure Other Than Mediated Settlement Conference in Superior Court Civil Action, Form AOC-CV-829, within twenty-one days of the senior resident superior

court judge's order requiring a conference. The motion shall include:

a. the type of settlement procedure requested;

b. the name, address, and telephone number of the neutral evaluator (neutral) selected by the parties;

c. the rate of compensation of the neutral;

d. that the neutral and opposing counsel have agreed upon the selection and compensation of the neutral; and

e. that all parties consent to the motion.

If the parties are unable to agree to each of the above, then the senior resident superior court judge shall deny the motion and the parties shall attend the conference as originally ordered by the court. If the motion is granted, then the court may order the use of any agreed upon settlement procedure authorized by Rule 10, Rule 11, Rule 12, or Rule 13, or by local rule of the superior court in the county or judicial district where the action is pending.

(3) **Timing of the Order**. The senior resident superior court judge shall issue the order requiring a mediated settlement conference as soon as practicable after the time for the filing of answers has expired. Both Rule 3(b) and subsection (c)(4) of this rule shall govern the content of the order and the date for completion of the conference.

(4) **Content of the Order**. The court's order shall be on an Order for Mediated Settlement Conference in Superior Court and Trial Calendar Notice, Form AOC-CV-811, and shall:

a. require that a mediated settlement conference be held in the case;

b. establish a deadline for the completion of the mediated settlement conference;

c. state clearly that the parties have the right to select their own mediator as provided by Rule 2;

d. state the rate of compensation of the court-appointed mediator, if the parties do not exercise their right to select a mediator under Rule 2; and

e. state that the parties shall be required to pay the mediator's fee at the conclusion of the mediated settlement conference, unless otherwise ordered by the court.

(5) **Motion for Court-Ordered Mediated Settlement Conference**. In cases not ordered to participate in a mediated settlement conference, any party may file a written motion with the senior resident superior court judge requesting that the conference be ordered. The motion shall state the reasons why the order should be allowed and shall be served on the nonmovant. Any objections to the motion may be filed in writing with the senior resident superior court judge within ten days of the date of the service of the motion. The judge shall rule on the motion without a hearing and shall notify the parties or their attorneys of the ruling.

(6) **Motion to Dispense with the Mediated Settlement Conference**. A party may move the senior resident superior court judge to dispense with a mediated settlement conference ordered by the judge. The motion shall state the reasons the relief is sought. For good cause shown, the senior resident superior court judge may grant the motion.

Good cause may include, but is not limited to, the fact that the parties (i) have participated in a settlement procedure, such as nonbinding arbitration or early neutral evaluation, prior to the court's order to participate in a conference; or (ii) have elected to resolve their case through arbitration.

(d) **Initiating the Mediated Settlement Conference by Local Rule.**

(1) **Order by Local Rule**. In judicial districts in which a system of scheduling orders or scheduling conferences is utilized to aid in the administration of civil cases, the senior resident superior court judge of the district shall, by local rule, require all persons and entities identified in Rule 4 to attend a pretrial mediated settlement conference in all civil actions, except those actions in which a party is seeking the issuance of an extraordinary writ or is appealing the revocation of a motor vehicle operator's license. The judge may withdraw his or her order

upon motion of a party under subsection (c)(6) of this rule only for good cause shown.

(2) **Scheduling Orders or Notices**. In judicial districts in which scheduling orders or notices are utilized to manage civil cases and for all cases ordered to participate in a mediated settlement conference by local rule, the order or notice shall: (i) require that a conference be held in the case; (ii) establish a deadline for the completion of the conference; (iii) state clearly that the parties have the right to designate their own mediator and state the deadline by which that designation should be made; (iv) state the rate of compensation of the court appointed mediator in the event that the parties do not exercise their right to designate a mediator; and (v) state that the parties shall be required to pay the mediator's fee at the conclusion of the conference, unless otherwise ordered by the court.

(3) **Scheduling Conferences**. In judicial districts in which scheduling conferences are utilized to manage civil cases and for cases ordered to participate in a mediated settlement conference by local rule, the notice for the scheduling conference shall: (i) require that a mediated settlement conference be held in the case; (ii) establish a deadline for the completion of the mediated settlement conference; (iii) state clearly that the parties have the right to designate their own mediator and state the deadline by which that designation should be made; (iv) state the rate of compensation of the court appointed mediator, in the event that the parties do not exercise their right to designate a mediator; and (v) state that the parties shall be required to pay the mediator's fee at the conclusion of the mediated settlement conference, unless otherwise ordered by the court.

(4) **Application of Rule 1(c)**. The provisions in subsections (c)(2), (c)(5), and (c)(6) of this rule shall apply to mediated settlement conferences initiated by local rule under subsection (d) of this rule, except for the time limitations set out in those subsections.

(5) **Deadline for Completion**. The provisions of Rule 3(b), which state the deadline for completion of the mediated settlement conference, shall not apply to mediated settlement conferences conducted under subsection (d) of this rule. The deadline for completion of the mediated

settlement conference shall be set by the senior resident superior court judge or the judge's designee at the scheduling conference or in the scheduling order or notice, whichever is applicable. However, the completion deadline set by the court shall be well in advance of the trial date.

(6) **Selection of the Mediator**. The parties may designate, or the senior resident superior court judge may appoint, a mediator under Rule 2, except that the time limits for designation and appointment shall be set by local rule. All other provisions of Rule 2 shall apply to mediated settlement conferences that are conducted under subsection (d) of this rule.

(7) **Use of Other Settlement Procedures**. The parties may utilize other settlement procedures under the provisions of subsection (c)(2) of this rule and Rule 10. However, the time limits and the method of moving the court for approval to utilize another settlement procedure set out in these rules shall not apply and shall be governed by local rules.

Comment

Comment to Rule 1(c)(6). If a party is unable to pay the costs of the mediated settlement conference or lives a significant distance from the conference site, then the court should consider Rule 4 or Rule 7 prior to dispensing with mediation for good cause. Rule 4 permits a party to attend the conference electronically, and Rule 7 permits parties to attend the conference and obtain relief from the obligation to pay the mediator's fee.

Rule 2. Designation of the Mediator

(a) **Designation of a Mediator by Agreement of Parties**. Within twenty-one days of the court's order, the parties may, by agreement, designate a mediator who is certified under these rules. A Designation of Mediator in Superior Court Civil Action, Form AOC-CV-812 (Designation Form), must be filed with the court within twenty-one days of the court's order. The plaintiff's attorney should file the Designation Form; however, any party may file the Designation Form. The party filing the Designation Form shall serve a copy on all parties and the mediator designated to conduct the mediated settlement conference. The Designation Form shall state: (i) the name, address, and telephone number of the mediator; (ii) the rate of compensation of the mediator; (iii) that the mediator and opposing counsel have agreed upon the designation and rate of compensation; and (iv) that the mediator is certified under these rules.

(b) **Appointment of a Mediator by the Court**. If the parties cannot agree on the designation of a mediator, then the plaintiff or the plaintiff's attorney shall notify the court by filing a Designation Form, requesting, on behalf of the parties, that the senior resident superior court judge appoint a mediator. The Designation Form must be filed within twenty-one days of the court's order and shall state that the attorneys for the parties have discussed the designation of a mediator and have been unable to agree.

Upon receipt of a Designation Form requesting the appointment of a mediator, or in the event that the parties fail to file a Designation Form with the court within twenty-one days of the court's order, the senior resident superior court judge shall appoint a mediator certified under these rules who has expressed a willingness to mediate actions within the senior resident superior court judge's district.

In appointing a mediator, the senior resident superior court judge shall rotate through a list of available certified mediators. Appointments shall be made without regard to race, gender, religious affiliation, or whether the mediator is a licensed attorney. The senior resident superior court judge shall retain discretion to depart from a strict rotation of mediators when, in the judge's discretion, there is good cause in a case to do so.

As part of the application or annual certification renewal process, all mediators shall designate the judicial districts in which they are willing to accept court appointments. Each designation is a representation that the designating mediator has read and will abide by the local rules for, and will accept appointments from, the designated district and will not charge for travel time and expenses incurred in carrying out his or her duties associated with those appointments. A mediator's refusal to accept an appointment in a judicial district designated by the mediator may be grounds for removal from the district's appointment list by the Dispute Resolution Commission (Commission) or the senior resident superior court judge.

The Commission shall provide the senior resident superior court judge of each judicial district a list of certified superior court mediators requesting appointments in that district. The list shall contain each mediator's name, address, and telephone number. The list shall be available on the Commission's website at https://www.ncdrc.gov.

The Commission shall promptly notify the senior resident superior court judge of any disciplinary action taken with respect to a mediator on the list of certified mediators for the judicial district.

(c) **Mediator Information Directory**. To assist the parties in designating a mediator, the Commission shall post a list of certified superior court mediators on its website at https://www.ncdrc.gov, accompanied by each mediator's contact information and the judicial districts in which each mediator is available to serve. If a mediator has supplied it to the Commission, the list shall also provide the mediator's biographical information, including information about the mediator's education, professional experience, and mediation training and experience.

(d) **Withdrawal or Disqualification of the Mediator.**

(1) Any party may move the senior resident superior court judge of the judicial district where the action is pending for an order disqualifying the mediator using a Notice of Withdrawal/Disqualification of Mediator and Order for Substitution of Mediator, Form AOC-DRC-20. For good cause, an order disqualifying the mediator shall be entered.

(2) A mediator who wishes to withdraw from a case may file a Notice of Withdrawal/Disqualification of Mediator and Order for Substitution of Mediator, Form AOC-DRC-20, with the senior resident superior court judge of the judicial district where the action is pending.

(3) If a mediator withdraws or is disqualified, then a substitute mediator shall be designated or appointed under this rule. A mediator who has withdrawn or been disqualified shall not be entitled to receive an administrative fee, unless the mediation has been commenced.

Rule 3. The Mediated Settlement Conference

(a) **Where the Mediated Settlement Conference Is to Be Held**. The mediated settlement conference shall be held in any location agreeable to the parties and the mediator. If the parties cannot agree on a location, then the mediator shall be responsible for reserving a neutral place in the county where the action is pending, for making arrangements for the conference, and for giving timely notice of the time and location of the conference to all attorneys, pro se parties, and other parties required to attend.

(b) **When the Mediated Settlement Conference Is to Be Held**. As a guiding principle, the mediated settlement conference should be held after the parties have had a reasonable time to conduct discovery, but well in advance of the trial date.

The court's order issued under Rule 1(c)(1) shall state a deadline for completion for the conference, which shall be not less than 120 days, nor more than 180 days, after issuance of the court's order. The mediator shall set a date and time for the conference under Rule 6(b)(5).

(c) **Extending Deadline for Completion**. The senior resident superior court judge may extend the deadline for completion of the mediated settlement conference upon the judge's own motion, upon stipulation of the parties, or upon the suggestion of the mediator.

(d) **Recesses**. The mediator may recess the mediated settlement conference at any time and may set times for reconvening. If the time for reconvening is set before the conference is recessed, then no further notification is required for persons present at the conference.

(e) **The Mediated Settlement Conference Is Not to Delay Other Proceedings**. The mediated settlement conference shall not be the cause for the delay of other proceedings in the case, including the completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the senior resident superior court judge.

Rule 4. Duties of Parties, Attorneys, and Other Participants in Mediated Settlement Conferences

(a) **Attendance**.

(1) **Persons Required to Attend**. The following persons shall attend a mediated settlement conference:

a. Parties to the action, to include the following:

1. All individual parties.

2. Any party that is a nongovernmental entity shall be represented at the mediated settlement conference by an officer, employee, or agent who is not the entity's outside counsel and who has been authorized to decide whether, and on what terms, to settle the action on behalf of the entity, or who has been authorized to negotiate on behalf of the entity and can promptly communicate during the conference with persons who have decision-making authority to settle the action; provided, however, that if a specific procedure is required by law (e.g., a statutory pre-audit certificate) or the entity's governing documents (e.g., articles of incorporation, bylaws,

partnership agreement, articles of organization, or operating agreement) to approve the terms of the settlement, then the representative shall have the authority to negotiate and make recommendations to the applicable approval authority in accordance with that procedure.

3. Any party that is a governmental entity shall be represented at the mediated settlement conference by an employee or agent who is not the entity's outside counsel and who: (i) has authority to decide on behalf of the entity whether and on what terms to settle the action; (ii) has been authorized to negotiate on behalf of the entity and can promptly communicate during the conference with persons who have decision-making authority to settle the action; or (iii) has authority to negotiate on behalf of the entity and to make a recommendation to the entity's governing board, if under applicable law the proposed settlement terms can be approved only by the entity's governing board.

Notwithstanding anything in these rules to the contrary, any agreement reached which involves a governmental entity may be subject to the provisions of N.C.G.S. § 159-28(a).

b. A representative of each liability insurance carrier, uninsured motorist insurance carrier, and underinsured motorist insurance carrier, which may be obligated to pay all or part of any claim presented in the action. Each carrier shall be represented at the mediated settlement conference by an officer, employee, or agent, other than the carrier's outside counsel, who has the authority to make a decision on behalf of the carrier, or who has been authorized to negotiate on behalf of the carrier, and can promptly communicate during the conference with persons who have decision-making authority.

c. At least one counsel of record for each party or other participant whose counsel has appeared in the action.

(2) **Physical Attendance Required**. Any party or person required to attend a mediated settlement conference shall physically attend until an agreement is reduced to writing and signed, as provided in subsection (c) of this rule, or an impasse has been declared. Any party or person may have the attendance requirement excused or modified, including the allowance of the party or person's participation without physical attendance by:

a. agreement of all parties, persons required to attend, and the mediator; or

b. order of the senior resident superior court judge, upon motion of a party and notice to the mediator and to all parties and persons required to attend.

(3) **Scheduling**. Participants required to attend the mediated settlement conference shall promptly notify the mediator after designation or appointment of any significant problems that they may have with the dates for conference sessions before the completion deadline, and shall inform the mediator of any problems that arise before an anticipated mediated settlement conference session is scheduled by the mediator. If a scheduling conflict in another court proceeding arises after a conference session has been scheduled by the mediator, then the participants shall promptly attempt to resolve the conflict under Rule 3.1 of the General Rules of Practice for the Superior and District Courts, or, if applicable, the Guidelines for Resolving Scheduling Conflicts adopted by the State-Federal Judicial Council of North Carolina on 20 June 1985.

(b) **Notifying Lienholders**. Any party or attorney who has received notice of a lien, or other claim upon proceeds recovered in the action, shall notify the lienholder or claimant of the date, time, and location of the mediated settlement conference, and shall request that the lienholder or claimant attend the conference or make a representative available with whom to communicate during the conference.

(c) **Finalizing Agreement**.

(1) If an agreement is reached at the mediated settlement conference, then the parties shall reduce the terms of the agreement to writing and sign the writing, along with their counsel. By stipulation of the parties and at the parties' expense, the agreement may be electronically

recorded. If the agreement resolves all issues in the dispute, then a consent judgment or one or more voluntary dismissals shall be filed with the court by such persons as the parties shall designate.

(2) If the agreement resolves all issues at the mediated settlement conference, then the parties shall give a copy of the signed agreement, consent judgment, or voluntary dismissal to the mediator and to all parties at the conference, and shall file the consent judgment or voluntary dismissal with the court within thirty days of the conference, or within ninety days if the State or a political subdivision of the State is a party to the action, or before expiration of the mediation deadline, whichever is later. In all cases, a consent judgment or voluntary dismissal shall be filed prior to the scheduled trial.

(3) If an agreement that resolves all issues in the dispute is reached prior to the mediated settlement conference, or is finalized while the conference is in recess, then the parties shall reduce the terms of the agreement to writing and sign the writing, along with their counsel, and shall file a consent judgment or voluntary dismissal disposing of all issues with the court within thirty days of the conference, or within ninety days if the State or a political subdivision of the State is a party to the action, or before expiration of the mediation deadline, whichever is later.

(4) When an agreement is reached upon all issues, all attorneys of record must notify the senior resident superior court judge within four business days of the settlement and advise who will file the consent judgment or voluntary dismissal.

(d) **Payment of the Mediator's Fee**. The parties shall pay the mediator's fee as provided by Rule 7.

(e) **Related Cases**. Upon application of any party or person, the senior resident superior court judge may order that an attorney of record or a party in a pending superior court civil action, or a representative of an insurance carrier that may be liable for all or any part of a claim pending in superior court, shall, upon reasonable notice, attend a mediation conference that may be convened in another pending case, regardless of the forum in which the other case may be pending, provided that all parties in the other pending case consent to the attendance ordered under this rule. Any attorney, party, or representative of an insurance carrier

that properly attends a mediation conference under this rule shall not be required to pay any of the mediation fees or costs related to that mediation conference. Any disputed issue concerning an order entered under this rule shall be determined by the senior resident superior court judge who entered the order.

(f) **No Recording**. There shall be no stenographic, audio, or video recording of the mediation process by any participant. This prohibition includes recording either surreptitiously or with the agreement of the parties.

Comment

Comment to Rule 4(a). Parties subject to Chapter 159 of the General Statutes of North Carolina—which provides, among other things, that if an obligation is evidenced by a contract or agreement requiring the payment of money or by a purchase order for supplies and materials, then the contract, agreement, or purchase order shall include on its face a certificate stating that the instrument has been pre-audited to assure compliance with N.C.G.S. § 159-28(a) and that an obligation incurred in violation of N.C.G.S. § 159-28(a) or (a1) is invalid and may not be enforced—should, as appropriate, inform all participants at the beginning of the mediation of the preaudit requirement and the consequences for failing to preaudit under N.C.G.S. § 159-28.

Comment to Rule 4(c). Consistent with N.C.G.S. § 7A-38.1(*l*), if a settlement is reached during a mediated settlement conference, then the mediator shall ensure that the terms of the settlement are reduced to writing and signed by the parties and their attorneys before ending the conference. No settlement shall be enforceable unless it has been reduced to writing and signed by the parties.

Cases in which an agreement upon all issues has been reached should be disposed of as expeditiously as possible. This assures that the mediator and the parties move the case toward disposition while honoring the private nature of the mediation process and the mediator's duty of confidentiality. If the parties wish to keep the terms of the settlement confidential, then they may timely file with the court closing documents that do not contain confidential terms (e.g., voluntary dismissal or a consent judgment resolving all claims). Mediators will not be required by local rules to submit agreements to the court.

Comment to Rule 4(e). Rule 4(e) clarifies a senior resident superior court judge's authority to order a party, attorney of record, or representative of an insurance carrier to attend proceedings in another forum that are related to the superior court civil action. For example, when there are workers' compensation claims being asserted in a case before North Carolina Industrial Commission, there are typically additional claims asserted in superior court against a third-party tortfeasor. Because of the related nature of the claims, it may be beneficial for a party, attorney of record, or representative of an insurance carrier in the superior court civil action to attend the North Carolina Industrial Commission mediation conference in order to resolve the pending claims.

Rule 4(e) specifically authorizes a senior resident superior court judge to order a party, attorney of record, or representative of an insurance carrier to attend a proceeding in another forum, provided that all parties in the related matter consent and the persons ordered to attend receive reasonable notice of the proceeding. The *North Carolina Industrial Commission Rules for Mediated Settlement and Neutral Evaluation Conferences* contain a similar provision, which provides that persons involved in a North Carolina Industrial Commission case may be ordered to attend a mediated settlement conference in a related matter.

Rule 5. Sanctions for Failure to Attend the Mediated Settlement Conference or Pay the Mediator's Fee

Any person required to attend a mediated settlement conference or to pay a portion of the mediator's fee in compliance with N.C.G.S. § 7A-38.1 and these rules who fails to attend the conference or pay the mediator's fee without good cause shall be subject to the contempt power of the court and any monetary sanctions imposed by a resident or presiding superior court judge. The monetary sanctions may include, but are not limited to, the payment of fines, attorneys' fees, the mediator's fee, expenses, and loss of earnings incurred by persons attending the conference.

A party seeking sanctions against another party or person shall do so in a written motion, stating the grounds for the motion and the relief sought. The motion shall be served on all parties and on any person against whom sanctions are being sought. The court may initiate sanction proceedings upon its own motion by the entry of a show cause order.

If the court imposes sanctions, it shall do so after notice and a hearing in a written order making findings of fact and conclusions of law. An order imposing sanctions shall be reviewable upon appeal if the entire record, as submitted, is reviewed to determine whether the order is supported by substantial evidence.

Rule 6. Authority and Duties of the Mediator

(a) **Authority of the Mediator**.

(1) **Control of the Mediated Settlement Conference**. The mediator shall at all times be in control of the mediated settlement conference and the procedures to be followed. The mediator's conduct shall be governed by the Standards of Professional Conduct for Mediators.

(2) **Private Consultation**. The mediator may communicate privately with any participant prior to, and during, the

mediated settlement conference. The fact that private communications have occurred with a participant shall be disclosed to all other participants at the beginning of the conference.

(b) **Duties of the Mediator**.

(1) **Informing the Parties**. At the beginning of the mediated settlement conference, the mediator shall define and describe for the parties:

a. the process of mediation;

b. the differences between mediation and other forms of conflict resolution;

c. the costs of the mediated settlement conference;

d. the fact that the mediated settlement conference is not a trial, that the mediator is not a judge, and that the parties retain their right to a trial if they do not reach settlement;

e. the circumstances under which the mediator may meet and communicate privately with any of the parties, or with any other person;

f. whether, and under what conditions, communications with the mediator will be held in confidence during the mediated settlement conference;

g. the inadmissibility of conduct and statements as provided by N.C.G.S. § 7A-38.1;

h. the duties and responsibilities of the mediator and the participants; and

i. the fact that any agreement reached will be reached by mutual consent.

(2) **Disclosure**. The mediator has a duty to be impartial and to advise all participants of any circumstances bearing on possible bias, prejudice, or partiality.

(3) **Declaring Impasse**. It is the duty of the mediator to determine in a timely manner that an impasse exists and that the mediated settlement conference should end. The mediator shall inquire of and consider the desires of the parties to cease or continue the conference.

(4) **Reporting Results of the Mediated Settlement Conference**.

a. The mediator shall report to the court the results of the mediated settlement conference and any settlement reached by the parties prior to, or during, a recess of the conference. Mediators shall also report the results of mediations held in other superior court civil cases in which a conference was not ordered by the court. The report shall be filed on a Report of Mediator in Superior Court Civil Action, Form AOC-CV-813, within ten days of the conclusion of the conference or within ten days of the mediator being notified of the settlement, and shall include the names of the persons who attended the conference, if a conference was held. Local rules shall not require the mediator to send a copy of the parties' agreement to the court.

b. If an agreement upon all issues is reached prior to or at the mediated settlement conference, or during a recess of the conference, then the mediator's report shall state whether the action will be concluded by consent judgment or voluntary dismissal and state the name, address, and telephone number of the person designated by the parties to file the consent judgment or dismissal with the court. The mediator shall advise the parties that Rule 4(c) requires them to file the consent judgment or voluntary dismissal with the court within thirty days of the conference, or within ninety days if the State or a political subdivision of the State is a party to the action, or before expiration of the mediation deadline, whichever is later. The mediator shall indicate on the report that the parties have been so advised.

c. The Commission or the North Carolina Administrative Office of the Courts (NCAOC) may require the mediator to provide statistical data for evaluation of the mediated settlement conference program.

d. A mediator who fails to report as required by this rule shall be subject to sanctions by the senior resident superior court judge. The sanctions shall

include, but are not limited to, fines or other monetary penalties, decertification as a mediator, and any other sanction available through the court's contempt power. The senior resident superior court judge shall notify the Commission of any action taken against a mediator under this subsection.

(5) **Scheduling and Holding the Mediated Settlement Conference**. It is the duty of the mediator to schedule and conduct the mediated settlement conference prior to the conference completion deadline set out in the court's order. The mediator shall make an effort to schedule the conference at a time that is convenient to all participants. In the absence of agreement, the mediator shall select a date and time for the conference. The deadline for completion of the conference shall be strictly observed by the mediator, unless the deadline is changed by written order of the senior resident superior court judge.

A mediator selected by agreement of the parties shall not delay scheduling or holding a conference because one or more of the parties has not paid an advance fee deposit as required by the agreement.

Comment

Parties subject to Chapter 159 of the General Statutes of North Carolina—which provides, among other things, that if an obligation is evidenced by a contract or agreement requiring the payment of money or by a purchase order for supplies and materials, then the contract, agreement, or purchase order shall include on its face a certificate stating that the instrument has been pre-audited to assure compliance with N.C.G.S. § 159-28(a) and that an obligation incurred in violation of N.C.G.S. § 159-28(a) or (a1) is invalid and may not be enforced—should, as appropriate, inform all participants at the beginning of the mediation of the preaudit requirement and the consequences for failing to preaudit under N.C.G.S. § 159-28.

Rule 7. Compensation of the Mediator and Sanctions

(a) **By Agreement**. When a mediator is stipulated to by the parties, compensation shall be as agreed upon between the parties and the mediator. Notwithstanding the terms of the parties' agreement with the mediator, subsection (d) of this rule shall apply to an issue involving compensation of the mediator. Subsections (e) and (f) of this rule shall apply unless the parties' agreement provides otherwise.

(b) **By Court Order**. When a mediator is appointed by the court, the parties shall compensate the mediator for mediation services at the rate of $150 per hour. The parties shall also pay the mediator a one-time, per-case administrative fee of $150, due upon appointment.

(c) **Change of Appointed Mediator**. Under Rule 2(a), the parties may select a certified mediator to conduct the mediated settlement conference. Parties who fail to select a certified mediator and then desire a substitution after the court has appointed a mediator shall obtain court approval for the substitution. The court may approve the substitution only upon proof of payment to the court's original appointee of the $150 one-time, per-case administrative fee, any other amount owed for mediation services under subsection (b) of this rule, and any postponement fee owed under subsection (e) of this rule.

(d) **Indigent Cases**. No party found to be indigent by the court for the purposes of these rules shall be required to pay a mediator's fee. A mediator conducting a mediated settlement conference under these rules shall waive the payment of fees from parties found by the court to be indigent. Any party may move the senior resident superior court judge for a finding of indigency and ask to be relieved of that party's obligation to pay a share of the mediator's fee using a Petition and Order for Relief from Obligation to Pay Mediator's Fee, Form AOC-CV-814.

The motion shall be heard subsequent to the completion of the conference or, if the parties do not settle their dispute, subsequent to trial. In ruling upon the motion, the judge shall apply the criteria enumerated in N.C.G.S. § 1-110(a), but shall consider the outcome of the action and whether a judgment was rendered in the movant's favor. The court shall enter an order granting or denying the party's motion.

(e) **Postponements and Fees**.

(1) As used in subsection (e) of this rule, "postponement" means to reschedule or not proceed with a mediated settlement conference once a date for a session of the conference has been scheduled by the mediator. After a conference has been scheduled for a specific date, a party may not unilaterally postpone the conference.

(2) A mediated settlement conference session may be postponed by the mediator for good cause only after notice by the movant to all parties of the reason for the postponement and a finding of good cause by the mediator. Good cause exists when the reason for the postponement

involves a situation over which the party seeking the postponement has no control, including, but not limited to: (i) the illness of a party or attorney, (ii) a death in the family of a party or attorney, (iii) a sudden and unexpected demand by a judge that a party or attorney for a party appear in court for a purpose not inconsistent with the guidelines established by Rule 3.1(d) of the General Rules of Practice for the Superior and District Courts, or (iv) inclement weather exists, such that travel is prohibitive. Where good cause is found, the mediator shall not assess a postponement fee against a party.

(3) The settlement of a case prior to the scheduled date for mediation shall be good cause for postponement; provided, however, that the mediator was notified of the settlement immediately after it was reached and at least fourteen calendar days prior to the date scheduled for the mediation.

(4) Without a finding of good cause, a mediator may also postpone a scheduled mediated settlement conference session with the consent of all parties. A fee of $150 shall be paid to the mediator if the postponement is allowed. However, if the request for a postponement is made within seven calendar days of the scheduled date for mediation, then the postponement fee shall be $300. The postponement fee shall be paid by the party requesting the postponement, unless otherwise agreed to by the parties. Postponement fees are in addition to the one-time, per-case administrative fee provided for in subsection (b) of this rule.

(5) If the parties select a certified mediator and contract with the mediator as to compensation, then the parties and the mediator may specify in their contract alternatives to the postponement fees otherwise required under subsection (e) of this rule.

(f) **Payment of Compensation by Parties**. Unless otherwise agreed to by the parties or ordered by the court, the mediator's fee shall be paid in equal shares by the parties. For purposes of this rule, multiple parties shall be considered one party when they are represented by the same counsel. Parties obligated to pay a share of the fees shall pay them equally. Payment shall be due upon completion of the mediated settlement conference.

Comment

Comment to Rule 7(b). Court-appointed mediators may not be compensated for travel time, mileage, or any other out-of-pocket expenses associated with a court-ordered mediation.

It is not unusual for two or more related cases to be mediated collectively. A mediator shall use his or her business judgment in assessing the one-time, per-case administrative fee when two or more cases are mediated together, and set his or her fee according to the amount of time that he or she spent in an effort to schedule the matters for mediation. The mediator may charge a flat fee of $150 if scheduling was relatively easy, or multiples of that amount if more effort was required.

Comment to Rule 7(e). Non-essential requests for postponements work a hardship on parties and mediators and serve only to inject delay into a process and program designed to expedite litigation. It is expected that mediators will assess a postponement fee in all instances where a request does not appear to be absolutely warranted. Moreover, mediators are encouraged not to agree to a postponement in instances where, in the mediator's judgment, the mediation could be held as scheduled.

Comment to Rule 7(f). If a party is found by a senior resident superior court judge to have failed to attend a mediated settlement conference without good cause, then the court may require that party to pay the mediator's fee and related expenses.

Rule 8. Mediator Certification and Decertification

(a) The Commission may receive and approve applications for certification of persons to be appointed as superior court mediators. In order to be certified, an applicant must satisfy the requirements of this subsection.

(1) The applicant must complete: (i) at least forty hours of Commission-certified trial court mediation training, or at least forty hours of Commission-certified family and divorce mediation training; and (ii) a sixteen-hour Commission-certified supplemental trial court mediation training.

(2) The applicant must have the following training, experience, and qualifications:

a. An attorney-applicant may be certified if he or she:

1. is a member in good standing of the North Carolina State Bar; or

2. is a member similarly in good standing of the bar of another state and eligible to apply for admission to the North Carolina State

Bar under Chapter 1, Subchapter C, of the North Carolina State Bar Rules and the Rules Governing the Board of Law Examiners and the Training of Law Students, 27 N.C. Admin. Code 1C.0105; demonstrates familiarity with North Carolina court structure, legal terminology, and civil procedure; provides to the Commission three letters of reference about the applicant's good character, including at least one letter from a person with knowledge of the applicant's professional practice; and possesses the experience required by this subsection; and

3. has at least five years of experience after date of licensure as a judge, practicing attorney, law professor, or mediator, or has equivalent experience.

b. A nonattorney-applicant may be certified if he or she:

1. has completed a six-hour training provided by a Commission-certified trainer on North Carolina court organization, legal terminology, civil court procedure, the attorney–client privilege, the unauthorized practice of law, and the common legal issues arising in superior court civil actions;

2. has provided to the Commission three letters of reference as to the applicant's good character, including at least one letter from a person with knowledge of the applicant's experience qualifying the applicant under subsection (a)(2)(b)(3) of this rule; and

3. has completed either:

i. a minimum of twenty hours of basic mediation training provided by a trainer acceptable to the Commission and, after completing the twenty-hour training, has mediated at least thirty disputes over the course of at least three years, or has equivalent experience, and possesses a four year college degree from

an accredited institution, except that the four-year degree requirement shall not be applicable to mediators certified prior to 1 January 2005, and has four years of professional, management, or administrative experience in a professional, business, or governmental entity; or

ii. ten years of professional, management, or administrative experience in a professional, business, or governmental entity, and possesses a four-year college degree from an accredited institution, except that the four year degree requirement shall not be applicable to mediators certified prior to 1 January 2005.

Any current or former attorney who is disqualified by the attorney licensing authority of any state shall be ineligible for certification under subsections (a)(2)(a) and (a)(2)(b) of this rule.

c. The applicant must complete the following observations:

1. **All Applicants**. All applicants for certification shall observe two mediated settlement conferences, at least one of which shall be of a superior court civil action.

2. **Nonattorney-Applicants**. Nonattorney-applicants for certification shall observe three mediated settlement conferences, in addition to those required under subsection (a)(2)(c)(1) of this rule, that are conducted by at least two different mediators. At least one of the additional observations shall be of a superior court civil action.

3. **Conferences Eligible for Observation.** Conferences eligible for observation under subsection (a)(2)(c) of this rule shall be those in cases pending before the North Carolina superior courts, the North Carolina Court of Appeals, the North Carolina Industrial Commission, the North Carolina Office of Administrative Hearings, or the federal district

courts in North Carolina that are ordered to mediation or conducted by an agreement of the parties which incorporates the rules of mediation of one of those entities.

Conferences eligible for observation shall also include those conducted in disputes prior to litigation that are mediated by an agreement of the parties and incorporate the rules for mediation of one of the entities named above.

All conferences shall be conducted by a certified superior court mediator under rules adopted by one of the above entities and shall be observed from their beginning to settlement or when an impasse is declared. Observations shall be reported on a Certificate of Observation – Mediated Settlement Conference Program, Form AOC-DRC-07.

All observers shall conform their conduct to the Commission's policy on *Requirements for Observer Conduct*.

(3) The applicant must demonstrate familiarity with the statutes, rules, and practices governing mediated settlement conferences in North Carolina.

(4) The applicant must be of good moral character and adhere to the Standards of Professional Conduct for Mediators when acting under these rules. On his or her application(s) for certification or application(s) for certification renewal, an applicant shall disclose any:

a. pending criminal charges;

b. criminal convictions;

c. restraining orders issued against him or her;

d. failures to appear;

e. pending or closed grievances or complaints filed with a professional licensing, certifying, or regulatory body, whether in North Carolina, another state, or another country;

f. disciplinary action taken against him or her by a professional licensing, certifying, or regulatory

body, whether in North Carolina, another state, or another country, including, but not limited to, disbarment, revocation, decertification, or suspension of any professional license or certification, including the suspension or revocation of any license, certification, registration, or qualification to serve as a mediator in another state or country, even if stayed;

g. judicial sanctions imposed against him or her in any jurisdiction; or

h. civil judgments, tax liens, or bankruptcy filings that occurred within the ten years preceding the date that the initial or renewal application was filed with the Commission.

A mediator shall report to the Commission any of the above-enumerated matters arising subsequent to the disclosures reported on the initial or renewal application for certification within thirty days of receiving notice of the matter.

As referenced in this subsection, criminal charges or convictions (excluding infractions) shall include felonies, misdemeanors, or misdemeanor traffic violations (including driving while impaired) under the law of North Carolina or another state, or under the law of a federal, military, or foreign jurisdiction, regardless of whether the adjudication was withheld (prayer for judgment continued) or the imposition of a sentence was suspended.

(5) The applicant must submit proof of qualifications set out in this rule on a form provided by the Commission.

(6) The applicant must pay all administrative fees established by the NCAOC upon the recommendation of the Commission.

(7) The applicant must agree to accept the fee ordered by the court under Rule 7 as payment in full of a party's share of the mediator's fee.

(8) The applicant must comply with the requirements of the Commission for completing and reporting continuing mediator education or training.

(9) The applicant must agree, once certified, to make reasonable efforts to assist applicants for mediator certification in completing their observation requirements.

(b) No mediator who held a professional license and relied upon that license to qualify for certification under subsections (a)(2)(a) or (a)(2)(b) of this rule shall be decertified or denied recertification because that mediator's license lapses, is relinquished, or becomes inactive; provided, however, that this subsection shall not apply to any mediator whose professional license is revoked, suspended, lapsed, relinquished, or whose professional license becomes inactive due to disciplinary action or the threat of disciplinary action from his or her licensing authority. Any mediator whose professional license is revoked, suspended, lapsed, or relinquished, or whose professional license becomes inactive, shall report the matter to the Commission.

(c) A mediator's certification may be revoked or not renewed at any time it is shown to the satisfaction of the Commission that a mediator no longer meets the qualifications set out in this rule or has not faithfully observed these rules or those of any district in which he or she has served as a mediator. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible for certification under this rule. No application for certification renewal shall be denied on the grounds that the mediator's training and experience does not meet the training and experience required under rules which were promulgated after the date of the applicant's original certification.

Comment

Comment to Rule 8(a)(2). Commission staff has discretion to waive the requirements set out in Rule 8(a)(2)(a)(2) and Rule 8(a)(2)(b)(1), if the applicant can demonstrate sufficient familiarity with North Carolina legal terminology, court structure, and procedure.

Rule 9. Certification of Mediation Training Programs

(a) Certified training programs for mediators who are seeking certification as a mediator for matters in superior court shall consist of a minimum of forty hours of instruction. The curriculum of such programs shall include the following topics:

(1) Conflict resolution and mediation theory.

(2) Mediation process and techniques, including the process and techniques of trial court mediation.

(3) Communication and information gathering skills.

(4) Standards of conduct for mediators, including, but not limited to, the Standards of Professional Conduct for Mediators.

(5) Statutes, rules, and practices governing mediated settlement conferences in North Carolina.

(6) Demonstrations of mediated settlement conferences.

(7) Simulations of mediated settlement conferences, involving student participation as the mediator, attorneys, and disputants, which shall be supervised, observed, and evaluated by program faculty.

(8) Satisfactory completion of an exam by all students, testing their familiarity with the statutes, rules, and practices governing mediated settlement conferences in North Carolina.

(b) Certified training programs for mediators who are already certified as family financial mediators shall consist of a minimum of sixteen hours. The curriculum of such programs shall include the topics in subsection (a) of this rule and a discussion of the mediation and culture of insured claims. There shall be at least two simulations as described in subsection (a)(7) of this rule.

(c) A training program must be certified by the Commission before a mediator's attendance at the program may be used to satisfy the training requirement under Rule 8(a). Certification does not need to be given in advance of attendance.

Training programs attended prior to the promulgation of these rules or attended in other states may be approved by the Commission if they are in substantial compliance with the standards set forth in this rule.

(d) To complete certification, a training program shall pay all administrative fees required by the NCAOC upon the recommendation of the Commission.

Rule 10. Other Settlement Procedures

(a) **Order Authorizing Other Settlement Procedures**. Upon receipt of a motion by the parties seeking authorization to utilize a settlement procedure in lieu of a mediated settlement conference, the senior resident superior court judge may order the use of the procedure requested under these rules or under local rules, unless the court finds that the parties did not agree on all of the relevant details of the procedure, including the items in Rule 1(c)(2), or that, for good cause, the selected procedure is not appropriate for the case or the parties.

(b) **Other Settlement Procedures Authorized by These Rules**. In addition to a mediated settlement conference, the following settlement procedures are authorized by these rules:

(1) Neutral evaluation under Rule 11 (a settlement procedure in which a neutral offers an advisory evaluation of the case following summary presentations by each party).

(2) Nonbinding arbitration under Rule 12 (a settlement procedure in which a neutral renders an advisory decision following summary presentations of the case by the parties).

(3) Binding arbitration under Rule 12 (a settlement procedure in which a neutral renders a binding decision following presentations by the parties).

(4) A summary trial (jury or non-jury) under Rule 13 (a settlement procedure that is either: (i) a nonbinding trial in which a privately procured jury or presiding officer renders an advisory verdict following summary presentations by the parties and, in the case of a summary jury trial, a summary of the law presented by a presiding officer; or (ii) a binding trial in which a privately procured jury or presiding officer renders a binding verdict following summary presentations by the parties and, in the case of a summary jury trial, a summary of the law presented by a presiding officer).

(c) **General Rules Applicable to Other Settlement Procedures**.

(1) **When Proceeding Is Conducted**. Other settlement procedures ordered by the court under these rules shall be conducted no later than the date for completion set out in the court's original mediated settlement conference order, unless extended by the senior resident superior court judge.

(2) **Authority and Duties of the Neutral**.

a. **Authority of the Neutral**.

1. **Control of the Proceeding**. The neutral, arbitrator, or presiding officer shall at all times be in control of the proceeding and the procedures to be followed.

2. **Scheduling the Proceeding**. The neutral, arbitrator, or presiding officer shall attempt to schedule the proceeding at a time that is convenient to the participants, attorneys, and the neutral. In the absence of agreement, the neutral shall select the date for the proceeding.

b. **Duties of the Neutral**.

1. **Informing the Parties**. At the beginning of the proceeding, the neutral, arbitrator, or presiding officer shall define and describe for the parties:

   i. the process of the proceeding;

   ii. the differences between the proceeding and other forms of conflict resolution;

   iii. the costs of the proceeding;

   iv. the inadmissibility of conduct and statements as provided by N.C.G.S. § 7A-38.1(*l*) and subsection (c)(6) of this rule; and

   v. the duties and responsibilities of the neutral and the participants.

2. Disclosure. The neutral has a duty to be impartial and to advise all participants of any circumstances bearing on possible bias, prejudice, or partiality.

3. Reporting Results of the Proceeding. The neutral, arbitrator, or presiding officer shall report the results of the proceeding to the court using a Report of Neutral Conducting Settlement Procedure Other Than Mediated Settlement Conference or Arbitration in Superior Court Civil Action, Form AOC-CV-817. The NCAOC may require the neutral to provide statistical data for evaluation of other settlement procedures.

4. Scheduling and Holding the Proceeding. It is the duty of the neutral, arbitrator, or presiding officer to schedule and conduct the proceeding prior to the completion deadline set out in the court's order. The deadline for completion of the proceeding shall be strictly observed by the neutral, arbitrator, or presiding officer, unless the deadline is changed by a written order of the senior resident superior court judge.

(3) **Extensions of Time**. A party or a neutral may request that the senior resident superior court judge extend the deadline for completion of the settlement procedure. The request for an extension shall state the reasons the extension is sought and shall be served by the movant on the other parties and the neutral. If the court grants the motion for an extension, then the order shall set a new deadline for the completion of the settlement procedure. A copy of the order shall be delivered to all parties and the neutral by the person who sought the extension.

(4) **Where the Proceeding Is Conducted**. The neutral, arbitrator, or presiding officer shall be responsible for reserving a place agreed to by the parties, setting a time for and making other arrangements for the proceeding, and for giving timely notice to all attorneys and unrepresented parties in writing of the time and location of the proceeding.

(5) **No Delay of Other Proceedings**. Settlement proceedings shall not be the cause for a delay of other proceedings in the case, including, but not limited to, the conduct or completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the senior resident superior court judge.

(6) **Inadmissibility of Settlement Proceedings.** Evidence of statements made and conduct that occurs in a mediated settlement conference or other settlement proceeding conducted under this rule, whether attributable to a party, mediator, neutral, or neutral-observer present at the settlement proceeding, shall not be subject to discovery and shall be inadmissible in any proceeding in the action or another civil action involving the same claim, except:

a. in proceedings for sanctions under subsection (c) of this rule;

b. in proceedings to enforce or rescind a settlement of the action;

c. in disciplinary proceedings before the North Carolina State Bar or any agency established to enforce the Standards of Professional Conduct for Mediators or standards of conduct for other neutrals; or

d. in proceedings to enforce laws concerning juvenile or elder abuse.

As used in this subsection, "neutral observer" includes persons seeking mediator certification, persons studying dispute resolution processes, and persons acting as interpreters.

No settlement agreement to resolve any or all issues reached at a proceeding conducted under this rule, or during its recesses, shall be enforceable, unless the agreement has been reduced to writing and signed by the parties. No evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a conference or other settlement proceeding.

No mediator, neutral, or neutral-observer present at a settlement proceeding shall be compelled to testify or produce evidence in any civil proceeding concerning statements made and conduct that occurs in anticipation of, during, or as a follow-up to a conference or other settlement proceeding under subsection (c) of this rule. This includes proceedings to enforce or rescind a settlement of the action, except to attest to the signing of any agreements, and during proceedings for sanctions under this section, proceedings to enforce laws concerning juvenile or elder abuse, and disciplinary hearings before the North Carolina State Bar or any agency established to enforce the Standards of Professional Conduct for Mediators or standards of conduct for other neutrals.

(7) **No Record Made**. There shall be no record made of any proceedings under these rules, unless the parties have stipulated to binding arbitration or a binding summary trial, in which case any party, after giving adequate notice to opposing parties, may make a record of the proceeding.

(8) **Ex Parte Communications Prohibited**. Unless all parties agree otherwise, there shall be no ex parte communication prior to the conclusion of the proceeding between the neutral and a party or a party's attorney on any matter related to the proceeding, except about administrative matters.

(9) **Duties of the Parties**.

a. **Attendance**. All persons required to attend a mediated settlement conference under Rule 4

shall attend any other nonbinding settlement procedure authorized by these rules and ordered by the court, except those persons to whom the parties agree and the senior resident superior court judge excuses. Those persons required to attend other settlement procedures which are binding in nature, authorized by these rules, and ordered by the court, shall be those persons to whom the parties agree. Notice of the agreement shall be given to the court and the neutral by filing a Motion to Use Settlement Procedure Other Than Mediated Settlement Conference in Superior Court Civil Action and Order, Form AOC-CV-818.

b. **Finalizing Agreement**.

1. If an agreement that resolves all issues in the dispute is reached at the neutral evaluation, arbitration, or summary trial, then the parties to the agreement shall reduce the terms of the agreement to writing and sign it along with their counsel. A consent judgment or voluntary dismissal shall be filed with the court by such persons as the parties shall designate within fourteen days of the conclusion of the proceeding or before the expiration of the deadline for its completion, whichever is later. The person responsible for filing closing documents with the court shall also sign the report to the court. The parties shall give a copy of their signed agreement, consent judgment, or voluntary dismissal to the neutral, arbitrator, or presiding officer, and all parties at the proceeding.

2. If an agreement that resolves all issues in the dispute is reached prior to the evaluation, arbitration, or summary trial, or while the proceeding is in recess, then the parties shall reduce the terms of the agreement to writing and sign the writing along with their counsel and shall file a consent judgment or voluntary dismissal disposing of all issues with the court within fourteen days of the agreement or before the expiration of the deadline for completion of the proceeding, whichever is later.

3. When an agreement is reached upon all issues in the dispute, all attorneys of record must notify the senior resident superior court judge within four business days of the settlement and advise the judge of the persons who will sign the consent judgment or voluntary dismissal.

c. **Payment of the Neutral's Fee**. The parties shall pay the neutral's fee as provided by subsection (c)(12) of this rule.

(10) **Selection of Neutrals in Other Settlement Procedures**. The parties may select any person to serve as a neutral in a settlement procedure authorized under these rules. For arbitration, the parties may either select a single arbitrator or a panel of arbitrators. Notice of the parties' selection shall be given to the court and to the neutral by filing a Motion to Use Settlement Procedure Other Than Mediated Settlement Conference in Superior Court Civil Action and Order, Form AOC-CV-818, within twenty-one days after the entry of the order requiring a mediated settlement conference.

The motion shall state: (i) the name, address, and telephone number of the neutral; (ii) the rate of compensation of the neutral; and (iii) that the neutral and opposing counsel have agreed upon the selection and compensation.

(11) **Disqualification**. Any party may move the resident or presiding superior court judge of the district in which an action is pending for an order disqualifying the neutral and, for good cause, an order disqualifying the neutral shall be entered. Good cause exists if the selected neutral has violated any standards of conduct of the North Carolina State Bar or any standards of conduct for neutrals adopted by the Supreme Court.

(12) **Compensation of the Neutral**. A neutral's compensation shall be paid in an amount agreed to by the parties and the neutral. Time spent reviewing materials in preparation for the neutral evaluation, conducting the proceeding, and making and reporting the award shall be compensable time.

Unless otherwise agreed by the parties or ordered by the court, the neutral's fee shall be paid in equal

shares by the parties. For purposes of this section, multiple parties shall be considered one party when they are represented by the same counsel. The presiding officer and jurors in a summary jury trial are neutrals within the meaning of these rules and shall be compensated by the parties.

(13) **Sanctions for Failure to Attend Other Settlement Procedure or Pay the Neutral's Fee**. Any person required to attend a settlement proceeding or to pay a neutral's fee in compliance with N.C.G.S. § 7A-38.1 and these rules who fails to attend the proceeding or pay the neutral's fee without good cause shall be subject to the contempt power of the court and any monetary sanctions imposed by a resident or presiding superior court judge. The monetary sanctions may include, but are not limited to, the payment of fines, attorneys' fees, the neutral's fee, expenses, and loss of earnings incurred by persons attending the proceeding. A party seeking sanctions against a person or a judge, upon his or her own motion, shall do so in a written motion stating the grounds for the motion and the relief sought. The motion shall be served on all parties and any person against whom sanctions are being sought. If the court imposes sanctions, it shall do so after giving notice to the person, holding a hearing, and issuing a written order that contains both findings of fact that are supported by substantial evidence and conclusions of law.

Rule 11. Rules for Neutral Evaluation

(a) **Nature of Neutral Evaluation**. Neutral evaluation is an informal, abbreviated presentation of the facts and issues by the parties to a neutral at an early stage of the case. The neutral is responsible for evaluating the strengths and weaknesses of the case, providing a candid assessment of liability, the settlement value, and a dollar value or range of potential awards if the case proceeds to trial. The neutral is also responsible for identifying areas of agreement and disagreement and suggesting necessary and appropriate discovery.

(b) **When the Neutral Evaluation Conference Is to Be Held**. As a guiding principle, the neutral evaluation conference should be held at an early stage of the case after the time for the filing of answers has expired, but in advance of the expiration of the discovery period.

(c) **Preconference Submissions**. No later than twenty days prior to the date established for the neutral evaluation conference to begin, each party shall provide the neutral with written information about the case and shall certify to the neutral that they provided a copy of such summary to all other parties in the case. The information provided to the neutral and the other parties shall be a summary of the significant facts and issues in the party's case, shall not be more than five pages in length, and shall have attached to it copies of any documents supporting the parties' summary. Information provided to the neutral and to the other parties under this paragraph shall not be filed with the court.

(d) **Replies to Preconference Submissions**. No later than ten days prior to the date set for the neutral evaluation conference to begin, any party may, but is not required to, send additional information to the neutral in writing, not exceeding three pages in length, responding to a question from an opposing party. The response shall be served on all other parties, and the party sending the response shall certify such service to the neutral, but the response need not be filed with the court.

(e) **Neutral Evaluation Conference Procedure**. Prior to a neutral evaluation conference, the neutral may request additional information in writing from any party. At the conference, the neutral may address questions to the parties and give the parties an opportunity to complete their summaries with a brief oral statement.

(f) **Modification of Procedure**. Subject to the approval of the neutral, the parties may agree to modify the procedures required by these rules for neutral evaluation.

(g) **Neutral's Duties**.

(1) **Neutral's Opening Statement**. At the beginning of the neutral evaluation conference, in addition to the matters set out in Rule 10(c)(2)(b), the neutral shall define and describe for the parties:

a. the fact that the neutral evaluation conference is not a trial, that the neutral is not a judge, that the neutral's opinions are not binding on any party, and that the parties retain the right to a trial if they do not reach a settlement; and

b. the fact that any settlement reached will be only by mutual consent of the parties.

(2) **Oral Report to Parties by Neutral**. In addition to the written report to the court required under these rules,

at the conclusion of the neutral evaluation conference, the neutral shall issue an oral report to the parties advising them of the neutral's opinion about the case. The opinion shall include a candid assessment of liability, an estimated settlement value, and the strengths and weaknesses of each party's claims in the event that the case proceeds to trial. The oral report shall also contain a suggested settlement or disposition of the case and the reason for the neutral's suggestion. The neutral shall neither reduce his or her oral report to writing nor inform the court of the oral report.

(3) **Report of Neutral to Court**. Within ten days after the completion of the neutral evaluation conference, the neutral shall file a written report with the court using a Report of Neutral Conducting Settlement Procedure Other Than Mediated Settlement Conference or Arbitration in Superior Court Civil Action, Form AOC-CV-817. The neutral's report shall inform the court when and where the conference was held, the names of those who attended, and the name of any party, attorney, or representative of an insurance carrier known to the neutral to have been absent from the conference without permission. The report shall also inform the court whether an agreement upon all issues was reached by the parties and, if so, state the name of the person designated to file the consent judgment or voluntary dismissal with the court. Local rules shall not require the neutral to send a copy of any agreement reached by the parties to the court.

(h) **Neutral's Authority to Assist Negotiations**. If all parties to the neutral evaluation conference request and agree, then a neutral may assist the parties in settlement discussions.

Rule 12. Rules for Arbitration

In an arbitration, the parties select an arbitrator who shall hear the case and enter an advisory decision. The arbitrator's decision is made to facilitate the parties' negotiation of a settlement and is nonbinding, unless: (i) neither party timely requests a trial de novo, in which case the arbitrator's decision is entered by the senior resident superior court judge as a judgment; or (ii) the parties agree that the arbitrator's decision shall be binding.

(a) **Arbitrator's Canon of Ethics**. Arbitrators shall comply with the North Carolina Canons of Ethics for Arbitrators promulgated by the

Supreme Court. An arbitrator shall be disqualified and must recuse himself or herself in accordance with the North Carolina Canons of Ethics for Arbitrators.

(b) **Exchange of Information.**

(1) **Prehearing Exchange of Information**. At least ten days before the date set for the arbitration hearing, the parties shall exchange in writing:

a. a list of witnesses that the party expects to testify;

b. a copy of documents or exhibits that the party expects to offer into evidence; and

c. a brief statement of the issues and contentions of the party.

The parties may agree in writing to rely on stipulations and statements, sworn or unsworn, rather than a formal presentation of witnesses and documents, for all or part of the hearing. Each party shall bring the materials to the hearing and provide a copy of the materials to the arbitrator. The materials shall not be filed with the court or included in the case file.

(2) **Exchanged Documents Considered Authenticated**. Any document exchanged by the parties may be received in the hearing as evidence without further authentication; however, the party against whom the document is offered may subpoena and examine as an adverse witness the author, custodian, or a witness through whom the document might otherwise have been introduced. Documents not so exchanged may not be received if to do so would, in the arbitrator's opinion, constitute unfair, prejudicial surprise.

(3) **Copies of Exhibits Admissible**. A copy of a document or exhibit that has been exchanged by the parties is admissible in an arbitration hearing in lieu of the original.

(c) **Arbitration Hearings**.

(1) **Witnesses**. Witnesses may be compelled to testify under oath or affirmation and produce evidence by the same authority and to the same extent as if the hearing were a trial. The arbitrator is empowered and authorized to administer oaths and affirmations in arbitration hearings.

(2) **Subpoenas**. Rule 45 of the North Carolina Rules of Civil Procedure shall apply to subpoenas for the attendance of witnesses and the production of documentary evidence at an arbitration hearing conducted under these rules.

(3) **Motions**. Designation of an action for arbitration does not affect a party's right to file a motion with the court.

a. The court, in its discretion, may consider and rule on a motion at any time. The court may defer consideration of an issue raised in a motion to the arbitrator for determination in the arbitration award. If the court defers the issue in the motion to the arbitrator, then the parties shall state their contentions regarding the motion to the arbitrator in the exchange of information that is required under subsection (b)(1) of this rule.

b. The pendency of a motion shall not be the cause for delaying an arbitration hearing, unless the court so orders.

(4) **Law of Evidence Used as Guide**. The law of evidence does not apply in an arbitration hearing, except as to privilege, but shall be considered as a guide toward full and fair development of the facts. The arbitrator shall consider all evidence presented and give it the weight and effect the arbitrator determines appropriate.

(5) **Authority of Arbitrator to Govern Hearings**. An arbitrator shall have the authority of a judge to govern the conduct of hearings, except for the court's contempt power. The arbitrator shall refer all matters involving contempt to the senior resident superior court judge.

(6) **Conduct of Hearing**. The arbitrator and the parties shall review the lists of witnesses, exhibits, and written statements concerning issues previously exchanged by the parties under subsection (b)(1) of this rule. The order of events during the hearing shall generally follow that of a trial with regard to opening statements and closing arguments of counsel, direct and cross-examination of witnesses, and the presentation of exhibits. However, in the arbitrator's discretion, the order of events may be varied.

(7) **No Record of Hearing Made**. No official transcript of an arbitration hearing shall be made. The arbitrator

may permit any party to make a record of the arbitration hearing in any manner that does not interfere with the proceeding.

(8) **Parties Must Be Present at Hearings; Representation**. Subject to the provisions of Rule 10(c)(9), all parties shall be present at hearings in person, or through a representative authorized to make binding decisions on the party's behalf, in all matters in controversy before the arbitrator. All parties may be represented by counsel or may appear pro se as permitted by law.

(9) **Hearing Concluded**. The arbitrator shall declare the hearing concluded when all the evidence has been presented and any arguments that the arbitrator permits have been completed. In exceptional cases, the arbitrator has the discretion to receive post-hearing briefs, but not evidence, if submitted within three days after the hearing concludes.

(d) **The Award**.

(1) **Filing the Award**. The arbitrator shall file an Arbitration Award – Superior Court, Form AOC-CV-806, signed by the arbitrator, with the clerk of superior court in the county where the action is pending, and shall provide a copy of the award to the senior resident superior court judge within twenty days of the conclusion of the hearing or the receipt of post-hearing briefs, whichever is later. The award shall inform the court of the absence of any party, attorney, or representative of an insurance carrier known to the arbitrator to have been absent from the arbitration without permission. The award form shall be used by the arbitrator as the arbitrator's report to the court and may also be used to record the arbitrator's award. If an agreement upon all issues was reached by the parties, then the award shall also inform the court of the agreement and state the name of the person designated to file the consent judgment or voluntary dismissal. Local rules shall not require the arbitrator to send a copy of any agreement reached by the parties to the court.

(2) **Findings; Conclusions; Opinions**. No findings of fact, conclusions of law, or opinions supporting an award are required.

(3) **Scope of Award.** The award must resolve all issues raised by the pleadings. The award may be in any amount supported by the evidence and shall include interest, as provided by law. The award may include attorneys' fees, as permitted by law.

(4) **Costs**. The arbitrator may include in an award court costs accruing through the arbitration proceedings in favor of the prevailing party.

(5) **Copies of Award to Parties**. The arbitrator shall deliver a copy of the award to all the parties or their counsel at the conclusion of the hearing, or the arbitrator shall serve the award after filing it with the court. A record shall be made by the arbitrator of the date and manner of service.

(e) **Trial De Novo**.

(1) **Trial De Novo as of Right**. Any party not in default for a reason subjecting that party to judgment by default who is dissatisfied with an arbitrator's award may have a trial de novo as of right upon filing an Arbitration Demand for Trial De Novo, Form AOC-CV-803 (Demand), with the court, and serving the Demand on all parties within thirty days of service of the arbitrator's award. A demand for a jury trial under Rule 38(b) of the North Carolina Rules of Civil Procedure does not preserve the right to a trial de novo. A demand by any party for a trial de novo, under this subsection, is sufficient to preserve the right of all other parties to a trial de novo. Any trial de novo under this subsection shall include all claims in the action.

(2) **No Reference to Arbitration in Presence of Jury**. A trial de novo shall be conducted as if there had been no arbitration proceeding. No reference may be made to prior arbitration proceedings in the presence of a jury without consent of all parties to the arbitration and the court's approval.

(f) **Judgment on the Arbitration Decision**.

(1) **Termination of Action Before Judgment**. A dismissal or consent judgment may be filed at any time before entry of judgment on an award.

(2) **Judgment Entered on Award**. If the case is not terminated by dismissal or consent judgment, and no party

files a demand for trial de novo within thirty days after the award is served, then the senior resident superior court judge shall enter judgment on the award, which shall have the same effect as a consent judgment in the action. A copy of the judgment shall be served on all parties or their counsel.

(g) **Agreement for Binding Arbitration**.

(1) **Written Agreement**. The arbitrator's decision may be binding upon the parties if all parties agree in writing. The agreement may be made at any time after the order for arbitration and prior to the filing of the arbitrator's decision. The written agreement shall be executed by the parties and their counsel and shall be filed with the clerk of superior court and the senior resident superior court judge prior to the filing of the arbitrator's decision.

(2) **Entry of Judgment on a Binding Decision**. The arbitrator shall file the decision with the clerk of superior court, and it shall become a judgment in the same manner as set out in N.C.G.S. § 1-569.25.

(h) **Modification Procedure**. Subject to approval of the arbitrator, the parties may agree to modify the procedures required by these rules for court-ordered arbitration.

Rule 13. Rules for Summary Trials

In a summary bench trial, evidence is presented in a summary fashion to a presiding officer, who shall render a verdict. In a summary jury trial, evidence is presented in summary fashion to a privately procured jury, which shall render a verdict. The goal of a summary trial is to obtain an accurate prediction of the ultimate verdict of a full civil trial as an aid to the parties and their settlement efforts.

Rule 23 of the General Rules of Practice for the Superior and District Courts also provides for summary jury proceedings. While parties may request the court's permission to utilize that process, it may not be substituted in lieu of a mediated settlement conference or other procedures outlined in these rules.

(a) **Pre-summary Trial Conference**. Prior to the summary trial, counsel for the parties shall attend a pre-summary trial conference with the presiding officer selected by the parties under Rule 10(c)(10). The presiding officer shall issue an order that does the following:

(1) Confirms the completion of discovery or sets a date for the completion.

(2) Orders that all statements made by counsel in the summary trial shall be founded on admissible evidence, either documented by deposition or other discovery previously filed and served, or by affidavits of the witnesses.

(3) Schedules all outstanding motions for hearing.

(4) Sets dates by which the parties exchange:

a. a list of the party's respective issues and contentions for trial;

b. a preview of the party's presentation, including notations as to the document (e.g., deposition, affidavit, letter, or contract) that supports that evidentiary statement;

c. all documents or other evidence that the party will rely on in making its presentation; and

d. all exhibits that the party will present at the summary trial.

(5) Sets the date by which the parties shall enter a stipulation, subject to the presiding officer's approval, detailing the time allowable for jury selection, opening statements, the presentation of evidence, and closing arguments (total time is usually limited to one day).

(6) Establishes a procedure by which private, paid jurors will be located and assembled by the parties, if a summary jury trial is to be held, and set the date by which the parties shall submit agreed upon jury instructions, jury selection questionnaire, and the number of potential jurors to be questioned and seated.

(7) Sets a date for the summary jury trial.

(8) Addresses such other matters as are necessary to place the matter in a posture for summary trial.

(b) **Presiding Officer to Issue Order if Parties Unable to Agree**. If the parties are unable to agree upon the dates and procedures set out in subsection (a) of this rule, then the presiding officer shall issue an order which addresses all matters necessary to place the case in a posture for summary trial.

(c) **Stipulation to a Binding Summary Trial**. At any time prior to the rendering of the verdict, the parties may stipulate that the summary trial will be binding on the parties and that the verdict will become a final judgment. The parties may also make a binding high/low agreement, wherein a verdict below a stipulated floor or above a stipulated ceiling would be rejected in favor of the floor or ceiling.

(d) **Evidentiary Motions**. Counsel shall exchange and file motions in limine and other evidentiary matters, which shall be heard prior to the trial. Counsel shall agree, prior to the hearing of the motions, as to whether the presiding officer's rulings will be binding in all subsequent hearings or nonbinding and limited to the summary trial.

(e) **Jury Selection**. In the case of a summary jury trial, potential jurors shall be selected in accordance with the procedure set out in the pre-summary trial order. These jurors shall complete a questionnaire previously stipulated to by the parties. Eighteen jurors, or a lesser number as the parties agree, shall submit to questioning by the presiding officer and each party for such time as is allowed under the summary trial pretrial order. Each party shall then have three peremptory challenges, to be taken alternately, beginning with the plaintiff. Following the exercise of all peremptory challenges, the first twelve seated jurors, or a lesser number as the parties may agree, shall constitute the panel.

After the jury is seated, the presiding officer, in his or her discretion, may describe the issues and procedures to be used in presenting the summary jury trial. The jury shall not be informed of the nonbinding nature of the proceeding, so as not to diminish the seriousness with which they consider the matter and in the event the parties later stipulate to a binding proceeding.

(f) **Presentation of Evidence and Arguments of Counsel.** Each party may make a brief opening statement. Following the opening statements, each side shall present its case within the time limits set in the summary trial pretrial order and may reserve a portion of its time for presenting rebuttal or surrebuttal evidence. Although closing arguments are generally omitted from a summary trial, subject to the presiding officer's discretion and the parties' agreement, each party may be allowed to make closing arguments within the time limits previously established.

Evidence shall be presented in summary fashion by the attorney for each party, without live testimony. Where the credibility of a witness is important in the dispute, the witness may testify in person or by video deposition. All statements of counsel shall be founded on evidence that would be admissible at trial and documented by prior discovery.

Affidavits offered into evidence shall be served upon opposing parties far enough in advance of the proceeding to allow time for affiants to be deposed. Counsel may read portions of the deposition to the jury. Photographs, exhibits, documentary evidence, and accurate summaries of evidence through charts, diagrams, evidence notebooks, or other visual means are encouraged, but shall be stipulated to by the parties or approved by the presiding officer.

(g) **Jury Charge**. In a summary jury trial, following the presentation of evidence by both parties, the presiding officer shall give a brief charge to the jury, relying on predetermined jury instructions and any additional instructions that the presiding officer deems appropriate.

(h) **Deliberation and Verdict**. In a summary jury trial, the presiding officer shall inform the jurors that they should attempt to return a unanimous verdict. The jury shall be given a verdict form stipulated to by the parties or approved by the presiding officer. The form may include specific interrogatories, a general liability inquiry, and/or an inquiry as to damages. If, after diligent efforts and a reasonable time to deliberate, the jury is unable to reach a unanimous verdict, then the presiding officer may recall the jurors and encourage them to reach a verdict quickly or inform them that they may return separate verdicts, in which case the presiding officer may distribute separate verdict forms.

In a summary bench trial, at the close of the presentation of evidence and arguments of counsel, and after allowing time for settlement discussions and consideration of the evidence by the presiding officer, the presiding officer shall render a decision. Upon a party's request, the presiding officer may allow three business days for the filing of post-hearing briefs. If the presiding officer takes the matter under advisement or allows post-hearing briefs, then the decision shall be rendered no later than ten days after the close of the hearing or filing of briefs, whichever is later.

(i) **Jury Questioning**. In a summary jury trial, the presiding officer may allow a brief conference with the jurors in open court after a verdict has been returned, in order to determine the basis of the jury's verdict. However, if a brief conference is utilized, then it should be limited to general impressions. The presiding officer should not allow counsel to ask detailed questions of jurors to prevent altering the summary trial from a settlement technique to a form of pretrial rehearsal. Jurors shall not be required to submit to counsels' questioning and shall be informed of the option to depart.

(j) **Settlement Discussions**. Upon retirement of the jury in a summary jury trial or the presiding officer in a summary bench trial,

the parties and/or their counsel shall meet for settlement discussions. Following the jury's verdict or decision by the court, the parties and/or their counsel shall meet to explore further settlement possibilities. The parties may request that the presiding officer remain available to provide input or guidance, as the presiding officer deems appropriate.

(k) **Modification of Procedure**. Subject to approval of the presiding officer, the parties may agree to modify the procedures set forth in these rules for summary trial.

(*l*) **Report of Presiding Officer**. The presiding officer shall file a written report no later than ten days after the verdict. The report shall be signed by the presiding officer and filed with the clerk of superior court in the county where the action is pending, with a copy of the report provided to the senior resident superior court judge. The presiding officer's report shall inform the court of the absence of any party, attorney, or representative of an insurance carrier known to the presiding officer to have been absent from the summary jury or summary bench trial without permission. The report may be used to record the verdict. In the event that an agreement was reached upon all issues in the dispute, the report shall also inform the court of the agreement and state the name of the person designated to file the consent judgment or voluntary dismissal. Local rules shall not require the presiding officer to send a copy of any agreement reached by the parties to the court.

Rule 14. Local Rule Making

The senior resident superior court judge of any judicial district conducting mediated settlement conferences under these rules is authorized to publish local rules, not inconsistent with these rules and N.C.G.S. § 7A-38.1, implementing conferences in that district.

Rule 15. Definitions

(a) "Senior resident superior court judge," as used throughout these rules, refers to the judge or, as appropriate, the judge's designee.

The phrase "senior resident superior court judge" also refers to a special superior court judge assigned to any action designated as a mandatory complex business case under N.C.G.S. § 7A-45.4, and to any judge to whom a case is assigned under Rule 2.1 and Rule 2.2 of the General Rules of Practice for the Superior and District Courts.

(b) "NCAOC form" refers to a form prepared, printed, and distributed by the NCAOC to implement these rules, or a form approved by local rule which contains at least the same information as a form

prepared by the NCAOC. Proposals for the creation or modification of a form may be initiated by the Commission.

Rule 16. Time Limits

Any time limit provided for by these rules may be waived or extended for good cause shown. Service of papers and computation of time shall be governed by the North Carolina Rules of Civil Procedure.

* * *

ORDER ADOPTING THE RULES FOR SETTLEMENT PROCEDURES IN DISTRICT COURT FAMILY FINANCIAL CASES

Pursuant to subsection 7A-38.4A(k) and subsection 7A-38.4A(*o*) of the General Statutes of North Carolina, the Court hereby adopts the Rules for Settlement Procedures in District Court Family Financial Cases, which appear on the following pages. These rules supersede the Rules of the North Carolina Supreme Court Implementing Settlement Procedures in Equitable Distribution and Other Family Financial Cases, published at 367 N.C. 1139–73.

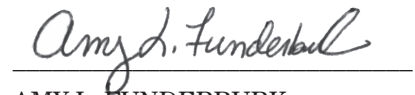
The Rules for Settlement Procedures in District Court Family Financial Cases become effective on 1 March 2020.

This order shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 23rd day of January, 2020.

For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 23rd day of January, 2020.



AMY L. FUNDERBURK
Clerk of the Supreme Court

Rules for Settlement Procedures in District Court Family Financial Cases

Rule 1. Initiating Settlement Procedures

(a) **Purposes of Mandatory Settlement Procedures**. These rules are promulgated under N.C.G.S. § 7A-38.4A to implement a system of settlement events, which are designed to focus the parties' attention on settlement, rather than on trial preparation, and to provide a structured opportunity for settlement negotiations to take place. Nothing in these rules is intended to limit or prevent the parties from engaging in settlement procedures voluntarily, either prior to or after those ordered by the court under these rules.

(b) **Duty of Counsel to Consult with Clients and Opposing Counsel Concerning Settlement Procedures**. In furtherance of the purposes set out in subsection (a) of this rule, upon being retained to represent any party to a district court case involving a family financial issue, including equitable distribution, child support, alimony, postseparation support, or a claim arising out of a contract between the parties under N.C.G.S. §§ 50-20(d), 52-10, or 52-10.1, or under Chapter 52B of the General Statutes of North Carolina, counsel shall advise his or her client regarding the settlement procedures approved by these rules. At, or prior to, the scheduling and discovery conference mandated by N.C.G.S. § 50-21(d), counsel for a party shall attempt to reach an agreement with opposing counsel on an appropriate settlement procedure for the action.

(c) **Ordering Settlement Procedures**.

(1) **Equitable Distribution Scheduling and Discovery Conference**. At the scheduling and discovery conference in equitable distribution cases, or at an earlier time as specified by local rule, the court shall issue a scheduling order. The scheduling order must include a requirement that the parties and their counsel attend a mediated settlement conference or, if the parties agree, another settlement procedure conducted under these rules, unless excused by the court under subsection (d) of this rule or by the court or mediator under Rule 4(a)(2). The court shall dispense with the requirement to attend a mediated settlement conference or other settlement procedure only for good cause shown.

(2) **Scope of Settlement Proceedings**. Any other family financial issue existing between the parties at the time that the equitable distribution settlement proceeding

is ordered, or at any time thereafter, may be discussed, negotiated, or decided at the equitable distribution settlement proceeding. In judicial districts where a custody and visitation mediation program has been established under N.C.G.S. § 7A-494, a child custody or visitation issue may be the subject of settlement proceedings ordered under these rules, but only by agreement of all parties and the mediator, when the parties have been exempted from, or have fulfilled, the program requirements. In judicial districts where a custody and visitation mediation program has not been established, a child custody or visitation issue may be the subject of settlement proceedings ordered under these rules by agreement of all parties and the mediator.

(3) **Authorizing Settlement Procedures Other Than a Mediated Settlement Conference**. The parties and their attorneys are in the best position to determine which settlement procedure is appropriate for resolving their dispute. Therefore, the court shall order the use of any settlement procedure authorized under Rule 10, Rule 11, or Rule 12, or by local rule of the district court in the county or judicial district where the case is pending, if the parties have agreed upon the procedure to be used, the neutral to be employed, and the amount of compensation of the neutral. If the parties have not agreed on all three items, then the court shall order the parties and their attorneys to attend a mediated settlement conference conducted under these rules.

If the parties wish to use a another settlement procedure, then the parties must submit a Motion for an Order to Use Settlement Procedure Other Than Mediated Settlement Conference or Judicial Settlement Conference in Family Financial Case, Form AOC-CV-826, at the scheduling and discovery conference, which shall include:

a. the settlement procedure chosen by the parties;

b. the name, address, and telephone number of the neutral selected by the parties;

c. the rate of compensation of the neutral; and

d. a statement indicating that all parties consent to the motion.

(4) **Content of the Order**. Using an Order for Mediated Settlement Conference in Family Financial Case, Form AOC-CV-824, the court shall:

a. require that a mediated settlement conference or other settlement proceeding be held in the case;

b. establish a deadline for the completion of the mediated settlement conference or proceeding; and

c. require the parties to pay the neutral's fee at the conclusion of the mediated settlement conference or proceeding, unless otherwise ordered by the court.

If the settlement proceeding ordered by the court is a judicial settlement conference, then the parties shall not be required to compensate the neutral.

The court's ruling on the motion shall be contained in the court's scheduling order or, if no scheduling order is entered, shall be on the Order for Mediated Settlement Conference in Family Financial Case, Form AOC-CV-824. Any scheduling order entered at the completion of a scheduling and discovery conference held pursuant to local rule may be signed by the parties or their attorneys, in lieu of submitting the forms referenced in these rules for the selection of a mediator.

(5) **Court-Ordered Settlement Procedures in Other Family Financial Cases**.

a. **By Motion of a Party**. Any party to a dispute involving a family financial issue, which was not previously ordered to a mediated settlement conference, may move the court for an order requiring the parties to participate in a settlement procedure. The motion shall be in writing, state the reasons why the motion should be granted, and be served on the nonmovant. Any objection to the motion or any request by a party for a hearing on the motion shall be filed in writing with the court within ten days of the date the motion was served. Thereafter, the court shall rule upon the motion and notify the parties or their attorneys of the ruling. If the court orders a settlement proceeding, then the proceeding shall be a mediated settlement conference conducted under

these rules. The court may order other settlement procedures if the circumstances outlined in subsection (c)(3) of this rule have been satisfied.

b. **By Order of the Court**. Upon its own motion, the court may order the parties and the parties' attorneys to attend a mediated settlement conference in any dispute involving a family financial issue or in a contempt proceeding involving a family financial issue.

The court may order a settlement procedure other than a mediated settlement conference only upon motion of the parties and a finding that the circumstances outlined in subsection (c)(3) of this rule have been met. The court shall consider the ability of the parties to compensate the mediator or neutral for his or her services before ordering the parties to participate in a settlement procedure under subsection (c)(5) of this rule and shall comply with the provisions of Rule 2 regarding the appointment of a mediator.

(d) **Motion to Dispense with Settlement Procedures**. A party may file a motion to dispense with the settlement procedure ordered by the court. The motion shall state the reasons relief is sought and, for good cause shown, the court may grant the motion.

Good cause may include, but is not limited to, the fact that (i) the parties have participated in a settlement procedure, such as nonbinding arbitration or early neutral evaluation, prior to the court's order to participate in a mediated settlement conference; (ii) the parties have elected to resolve their case through arbitration under the Family Law Arbitration Act, N.C.G.S. §§ 50-41 to 50-62; or (iii) one of the parties has alleged domestic violence.

Comment

Comment to Rule 1(d). If a party is unable to pay the costs of the mediated settlement conference or lives a significant distance from the conference site, then the court should consider Rule 4 and Rule 7 prior to dispensing with mediation for good cause. Rule 4 permits a party to attend the conference electronically under certain circumstances, and Rule 7 permits parties to attend the conference and obtain relief from the obligation to pay the mediator's fee.

Rule 2. Designation of the Mediator

(a) **Designation of a Mediator by Agreement of the Parties**. By agreement, the parties may designate a family financial mediator certified under these rules by filing a Designation of Mediator in Family Financial Case, Form AOC-CV-825 (Designation Form), with the court at the scheduling and discovery conference. The Designation Form shall state: (i) the name, address, and telephone number of the designated mediator; (ii) the rate of compensation of the mediator; (iii) that the mediator and opposing counsel have agreed upon the designation and rate of compensation; and (iv) that the mediator is certified under these rules.

If the parties wish to designate a mediator who is not certified under these rules, the parties may nominate a noncertified mediator by filing a Designation Form with the court at the scheduling and discovery conference. If the parties choose to nominate a mediator, then the Designation Form shall state: (i) the name, address, and telephone number of the mediator; (ii) the training, experience, and other qualifications of the mediator; (iii) the rate of compensation of the mediator; (iv) that the mediator and opposing counsel have agreed upon the nomination; and (v) the rate of compensation, if any. The court shall approve the nomination if, in the court's opinion, the nominee is qualified to serve as the mediator and the parties and the nominee have agreed on the rate of compensation.

A copy of each form submitted to the court and the court's order requiring a mediated settlement conference shall be delivered to the mediator by the parties.

(b) **Appointment of a Mediator by the Court**. If the parties cannot agree on the designation of a mediator, then the parties shall notify the court by filing a Designation Form requesting that the court appoint a mediator. The Designation Form shall be filed at the scheduling and discovery conference and state that the attorneys for the parties have discussed the designation of a mediator and have been unable to agree on a mediator. Upon receipt of a Designation Form requesting the appointment of a mediator, or upon the parties' failure to file a Designation Form with the court, the court shall appoint a family financial mediator certified under these rules who has expressed a willingness to mediate disputes within the judicial district.

In appointing a mediator, the court shall rotate through a list of available certified mediators. Appointments shall be made without regard to race, gender, religious affiliation, or whether the mediator is a licensed attorney. The court shall retain discretion to depart from a strict rotation

of mediators when, in the court's discretion, there is good cause in a case to do so.

As part of the application or certification renewal process, all mediators shall designate the judicial districts in which they are willing to accept court appointments. Each designation is a representation that the designating mediator has read and will abide by the local rules for, and will accept appointments from, the designated district and will not charge for travel time and expenses incurred in carrying out his or her duties associated with those appointments. A mediator's refusal to accept an appointment in a judicial district designated by the mediator may be grounds for the mediator's removal from the district's appointment list by the Dispute Resolution Commission (Commission) or the chief district court judge.

The Commission shall provide the district court judges in each judicial district a list of certified family financial mediators requesting appointments in that district. The list shall contain each mediator's name, address, and telephone number. The list shall be provided to the judges electronically through the Commission's website at https://www.ncdrc.gov.

The Commission shall promptly notify the district court of any disciplinary action taken with respect to a mediator on the list of certified mediators for the judicial district.

(c) **Mediator Information**. To assist the parties in designating a mediator, the Commission shall assemble, maintain, and post a list of certified family financial mediators on its website at https://www.ncdrc.gov, accompanied by each mediator's contact information and the judicial districts in which each mediator is available to serve. When a mediator has supplied it to the Commission, the list shall also provide the mediator's biographical information, including information about the mediator's education, professional experience, and mediation training and experience.

(d) **Withdrawal or Disqualification of the Mediator**.

(1) Any party may move the chief district court judge of the judicial district where the case is pending for an order disqualifying the mediator using a Notice of Withdrawal/Disqualification of Mediator and Order for Substitution of Mediator, Form AOC-DRC-20. For good cause, an order disqualifying the mediator shall be entered.

(2) A mediator who wishes to withdraw from a case may file a Notice of Withdrawal/Disqualification of Mediator and

Order for Substitution of Mediator, Form AOC-DRC-20, with the chief district court judge of the judicial district where the case is pending.

(3) If a mediator withdraws or is disqualified, then a substitute mediator shall be designated or appointed under this rule. A mediator who has withdrawn or been disqualified shall not be entitled to receive an administrative fee, unless the mediation has been commenced.

Rule 3. The Mediated Settlement Conference

(a) **Where the Mediated Settlement Conference Is to Be Held**. The mediated settlement conference shall be held in any location agreeable to the parties and the mediator. If the parties cannot agree to a location, then the mediator shall be responsible for reserving a neutral location in the county where the case is pending, for making arrangements for the conference, and for giving timely notice of the time and location of the conference to all attorneys, pro se parties, and other persons required to attend.

(b) **When the Mediated Settlement Conference Is to Be Held**. As a guiding principle, the mediated settlement conference should be held after the parties have had a reasonable time to conduct discovery, but well in advance of the trial date. The mediator is authorized to assist the parties in establishing a discovery schedule and completing discovery.

The court's order issued under Rule 1(c)(1) shall state a deadline for completion of the conference which shall not be more than 150 days after issuance of the court's order, unless extended by the court. The mediator shall set a date and time for the conference under Rule 6(b)(5).

(c) **Extending Deadline for Completion**. The court may extend the deadline for completion of the mediated settlement conference upon the court's own motion, on stipulation of the parties, or on suggestion of the mediator.

(d) **Recesses**. The mediator may recess the mediated settlement conference at any time and may set times for reconvening. If the time for reconvening is set during the conference, then no further notification is required for persons present at the conference.

(e) **The Mediated Settlement Conference Is Not to Delay Other Proceedings**. The mediated settlement conference shall not be the cause for the delay of other proceedings in the case, including the completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the court.

Rule 4. Duties of Parties, Attorneys, and Other Participants in Mediated Settlement Conferences

(a) **Attendance**.

(1) The following persons shall attend a mediated settlement conference:

a. The parties.

b. At least one counsel of record for each party whose counsel has appeared in the case.

(2) Any party or other person required to attend a mediated settlement conference shall physically attend the conference until an agreement is reduced to writing and signed as provided in subsection (b) of this rule, or until an impasse has been declared. Any such party or person may have the attendance requirement excused or modified, including permitting participation without physical attendance, by:

a. agreement of all parties and persons required to attend the conference and the mediator; or

b. order of the court, upon motion of a party and notice to all parties and persons required to attend the conference and the mediator.

(b) **Scheduling**. Participants required to attend the mediated settlement conference shall promptly notify the mediator, after selection or appointment, of any significant problems that they may have with the dates for mediated settlement conference sessions before the completion deadline, and shall inform the mediator of any problems that arise before an anticipated conference session is scheduled by the mediator. If a scheduling conflict in another court proceeding arises after a conference session has been scheduled by the mediator, then participants shall promptly attempt to resolve the conflict under Rule 3.1 of the General Rules of Practice for the Superior and District Courts, or, if applicable, the Guidelines for Resolving Scheduling Conflicts adopted by the State-Federal Judicial Council of North Carolina on 20 June 1985.

(c) **Finalizing Agreement**.

(1) If an agreement is reached at the mediated settlement conference, then the parties shall reduce the essential terms of the agreement to writing.

a. If the parties conclude the mediated settlement conference with a written document containing all

of the terms of their agreement for property distribution and do not intend to submit their agreement to the court for approval, then the agreement shall be signed by all parties and formally acknowledged as required by N.C.G.S. § 50-20(d). If the parties conclude the conference with a written document containing all of the terms of their agreement and intend to submit their agreement to the court for approval, then the agreement shall be signed by all parties, but need not be formally acknowledged. In all cases, the mediator shall report a settlement to the court and include in the report the name of the person responsible for filing closing documents with the court.

b. If the parties reach an agreement at the mediated settlement conference regarding property distribution and do not intend to submit their agreement to the court for approval, but are unable to complete a final document reflecting their settlement or have it signed and acknowledged as required by N.C.G.S. § 50-20(d), then the parties shall produce a written summary of their understanding and use it to guide them in writing any agreements as may be required to give legal effect to their understanding. If the parties intend to submit their agreement to the court for approval, then the agreement must be in writing and signed by the parties, but need not be formally acknowledged. The mediator shall facilitate the production of the summary and shall either:

1. report to the court that the matter has been settled and include in the report the name of the person responsible for filing closing documents with the court; or

2. declare, in the mediator's discretion, a recess of the mediated settlement conference.

If a recess is declared, then the mediator may schedule another session of the conference if the mediator determines that it would assist the parties in finalizing a settlement.

(2) In all cases where an agreement is reached after being ordered to mediation, whether prior to, or during, the

mediation, or during a recess, the parties shall file a consent judgment or voluntary dismissal with the court within thirty days of the agreement or before the expiration of the mediation deadline, whichever is later. The mediator shall report to the court that the matter has been settled and who reported the settlement.

(3) An agreement regarding the distribution of property, reached at a proceeding conducted under this section or during a recess of the mediated settlement conference, which has not been approved by a court, shall not be enforceable unless it has been reduced to writing, signed by the parties, and acknowledged as required under N.C.G.S. § 50-20(d).

(d) **Payment of the Mediator's Fee**. The parties shall pay the mediator's fee as provided by Rule 7.

(e) **No Recording**. There shall be no stenographic, audio, or video recording of the mediation process by any participant. This prohibition includes recording either surreptitiously or with the agreement of the parties.

Comment

Comment to Rule 4(c). Consistent with N.C.G.S. § 7A-38.4A(j), no settlement shall be enforceable unless it has been reduced to writing and signed by the parties. When a settlement is reached during a mediated settlement conference, the mediator shall ensure that the terms of the agreement are reduced to writing and signed by the parties and their attorneys before ending the conference.

Cases in which an agreement on all issues has been reached should be disposed of as expeditiously as possible. This assures that the mediator and the parties move the case toward disposition while honoring the private nature of the mediation process and the mediator's duty of confidentiality. If the parties wish to keep the terms of the settlement confidential, then they may timely file closing documents with the court, as long as those documents do not contain confidential terms (e.g., a voluntary dismissal or consent judgment resolving all claims). Mediators will not be required by local rules to submit agreements to the court.

Rule 5. Sanctions for Failure to Attend the Mediated Settlement Conference or Pay the Mediator's Fee

Any person required to attend a mediated settlement conference or to pay a portion of the mediator's fee in compliance with N.C.G.S. § 7A-38.4A and these rules who fails to attend the conference or pay the mediator's fee without good cause shall be subject to the contempt power of the court and any monetary sanctions imposed by the court.

The monetary sanctions may include, but are not limited to, the payment of fines, attorneys' fees, the mediator's fee, expenses, and loss of earnings incurred by persons attending the conference.

A party seeking sanctions against another party or person shall do so in a written motion stating the grounds for the motion and the relief sought. The motion shall be served on all parties and on any person against whom sanctions are being sought. The court may initiate sanction proceedings upon its own motion by the entry of a show cause order.

If the court imposes sanctions, it shall do so after notice and a hearing, in a written order making findings of fact and conclusions of law. An order imposing sanctions shall be reviewable upon appeal if the entire record, as submitted, is reviewed to determine whether the order is supported by substantial evidence.

Rule 6. Authority and Duties of the Mediator

(a) **Authority of the Mediator**.

(1) **Control of the Mediated Settlement Conference**. The mediator shall at all times be in control of the mediated settlement conference and the procedures to be followed. The mediator's conduct shall be governed by the Standards of Professional Conduct for Mediators.

(2) **Private Consultation**. The mediator may communicate privately with any participant during the mediated settlement conference. However, there shall be no ex parte communication before or outside the conference between the mediator and any counsel or party regarding any aspect of the proceeding, except about scheduling matters. Nothing in this rule prevents the mediator from engaging in ex parte communications with the consent of the parties for the purpose of assisting settlement negotiations.

(b) **Duties of the Mediator**.

(1) **Informing the Parties**. At the beginning of the mediated settlement conference, the mediator shall define and describe for the parties:

a. the process of mediation;

b. the differences between mediation and other forms of conflict resolution;

c. the costs of the mediated settlement conference;

d. the fact that the mediated settlement conference is not a trial, that the mediator is not a judge, and that the parties retain their right to a trial if they do not reach settlement;

e. the circumstances under which the mediator may meet and communicate privately with any of the parties, or with any other person;

f. whether, and under what conditions, communications with the mediator will be held in confidence during the mediated settlement conference;

g. the inadmissibility of conduct and statements as provided by N.C.G.S. § 7A-38.4A(j);

h. the duties and responsibilities of the mediator and the participants; and

i. the fact that any agreement reached will be reached by mutual consent.

(2) **Disclosure**. The mediator has a duty to be impartial and to disclose to all participants any circumstance bearing on possible bias, prejudice, or partiality.

(3) **Declaring Impasse**. It is the duty of the mediator to determine in a timely manner that an impasse exists and that the mediated settlement conference should end. To that end, the mediator shall inquire of and consider the desires of the parties to cease or continue the conference.

(4) **Reporting Results of the Mediated Settlement Conference**.

a. The mediator shall report the results of the mediated settlement conference and any settlement reached by the parties prior to, or during, a recess of the conference to the court. Mediators shall also report the results of mediations held in other district court family financial cases in which a mediated settlement conference was not ordered by the court. The report shall be filed on a Report of Mediator in Family Financial Case, Form AOC-CV-827, within ten days of the conclusion of the conference or within ten days of being notified of the settlement, and shall include the names of the persons who attended the conference, if a conference was held.

If a partial agreement was reached at the conference, then the report shall state the issues that remain for trial. Local rules shall not require the mediator to send a copy of the parties' agreement to the court.

b. If an agreement upon all issues was reached at the mediated settlement conference, then the mediator's report shall state whether the dispute will be resolved by a consent judgment or voluntary dismissal, and the name, address, and telephone number of the person designated by the parties to file the consent judgment or dismissal with the court, as required under Rule 4(b)(2). The mediator shall advise the parties that, consistent with Rule 4(b)(2), their consent judgment or voluntary dismissal is to be filed with the court within thirty days of the conference or before the expiration of the mediation deadline, whichever is later. The mediator's report shall indicate that the parties have been so advised.

c. The Commission or the North Carolina Administrative Office of the Courts (NCAOC) may require the mediator to provide statistical data for evaluation of the mediated settlement conference program.

d. A mediator who fails to report as required by this rule shall be subject to sanctions by the court. The sanctions shall include, but are not limited to, fines or other monetary penalties, decertification as a mediator, and any other sanctions available through the court's contempt power. The court shall notify the Commission of any sanction imposed against a mediator under this section.

(5) **Scheduling and Holding the Mediated Settlement Conference**. The mediator shall schedule and conduct the mediated settlement conference prior to the conference completion deadline set out in the court's order. The mediator shall make an effort to schedule the conference at a time that is convenient to all participants. In the absence of agreement, the mediator shall select a date and time for the conference. The deadline for completion of the conference shall be strictly observed by the mediator, unless the deadline is changed by written order of the court.

A mediator selected by agreement of the parties shall not delay scheduling or conducting the conference because one or more of the parties has not paid an advance fee deposit as required by the agreement.

Rule 7. Compensation of the Mediator and Sanctions

(a) **By Agreement**. When a mediator is selected by agreement of the parties, compensation shall be as agreed upon between the parties and the mediator. Notwithstanding the terms of the parties' agreement with the mediator, subsection (e) of this rule shall apply to an issue involving compensation of the mediator. Subsections (d) and (f) of this rule shall apply unless the parties' agreement provides otherwise.

(b) **By Court Order**. When the mediator is appointed by the court, the parties shall compensate the mediator for mediation services at the rate of $150 per hour. The parties shall also pay the mediator a one-time, per-case administrative fee of $150, which accrues upon appointment.

(c) **Change of Appointed Mediator**. Parties who fail to select a mediator and then desire a substitution after the court has appointed a mediator shall obtain court approval for the substitution. The court may approve the substitution only upon proof of payment to the court's original appointee of the $150 one-time, per-case administrative fee, any other amount due for mediation services under subsection (b) of this rule, and any postponement fee owed under subsection (f) of this rule.

(d) **Payment of Compensation by the Parties**. Unless otherwise agreed to by the parties or ordered by the court, the mediator's fee shall be paid in equal shares by the parties. Payment shall be due upon the completion of the mediated settlement conference.

(e) **Inability to Pay**. No party found by the court to be unable to pay its full share of the mediator's fee shall be required to do so. Any party required to pay a share of a mediator's fee under subsections (b) and (c) of this rule may move the court for relief using a Petition and Order for Relief from Obligation to Pay All or Part of Mediator's Fee in Family Financial Case, Form AOC-CV-828.

In ruling upon the motion, the court may consider the income and assets of the movant and the outcome of the dispute. The court shall enter an order granting or denying the party's motion. The court may require that one or more shares be paid out of the marital estate.

Any mediator conducting a mediated settlement conference under these rules shall accept as payment in full of a party's share of the mediator's fee that portion paid by, or on behalf of, the party pursuant to a

court order issued under this rule.

(f) **Postponements and Fees**.

(1) As used in subsection (f) of this rule, "postponement" means to reschedule or not proceed with a mediated settlement conference once a date for the conference has been scheduled by the mediator. After a conference has been scheduled for a specific date, a party may not unilaterally postpone the conference.

(2) A mediated settlement conference may be postponed by a mediator for good cause only after notice by the movant to all parties of the reason for the postponement and a finding of good cause by the mediator. Good cause exists when the reason for the postponement involves a situation over which the party seeking the postponement has no control, including, but not limited to: (i) the illness of a party or attorney, (ii) a death in the family of a party or attorney, (iii) a sudden and unexpected demand by the court that a party or attorney for a party appear in court for a purpose not inconsistent with the guidelines established by Rule 3.1(d) of the General Rules of Practice for the Superior and District Courts, or (iv) inclement weather exists, such that travel is prohibitive. Where good cause is found, the mediator shall not assess a postponement fee.

(3) The settlement of a case prior to the scheduled date for mediation shall be good cause for postponement; provided, however, that the mediator was notified of the settlement immediately after it was reached and at least fourteen calendar days prior to the date scheduled for the mediation.

(4) Without a finding of good cause, a mediator may also postpone a scheduled mediated settlement conference session with the consent of all parties. A fee of $150 shall be paid to the mediator if the postponement is allowed. However, if the request for a postponement is made within seven calendar days of the scheduled date for mediation, then the postponement fee shall be $300. The postponement fee shall be paid by the party requesting the postponement, unless otherwise agreed to by the parties. Postponement fees are in addition to the one-time,

per-case administrative fee provided for in subsection (b) of this rule.

(5) If the parties select a certified mediator and contract with the mediator as to compensation, then the parties and the mediator may specify in their contract alternatives to the postponement fees otherwise required under subsection (f) of this rule.

Comment

Comment to Rule 7(b). Court-appointed mediators may not be compensated for travel time, mileage, or any other out-of-pocket expenses associated with a court-ordered mediation.

Comment to Rule 7(d). If a party is found by the court to have failed to attend a mediated settlement conference without good cause, then the court may require that party to pay the mediator's fee and related expenses.

Comment to Rule 7(f). Non-essential requests for postponements work a hardship on parties and mediators and serve only to inject delay into a process and program designed to expedite litigation. It is expected that mediators will assess a postponement fee in all instances where a request does not appear to be absolutely warranted. Moreover, mediators are encouraged not to agree to a postponement in instances where, in the mediator's judgment, the mediation could be held as scheduled.

Rule 8. Mediator Certification and Decertification

(a) The Commission may receive and approve applications for certification of persons to be appointed as mediators for family financial matters in district court. In order to be certified, an applicant must satisfy the requirements of this subsection.

(1) The applicant for certification must have a basic understanding of North Carolina family law. Applicants should be able to demonstrate that they have completed at least twelve hours of basic family law education by:

a. attending workshops or programs on topics such as separation and divorce, alimony and postseparation support, equitable distribution, child custody and support, and domestic violence;

b. completing an independent study on these topics, such as viewing or listening to video or audio programs on family law topics; or

c. having equivalent North Carolina family law experience, including work experience that satisfies one

of the categories set forth in the Commission's policy on interpreting Rule 8(a)(1) (e.g., the applicant is an experienced family law judge or board certified family law attorney).

(2) The applicant for certification must:

a. have an Advanced Practitioner Designation from the Association for Conflict Resolution (ACR) and have earned an undergraduate degree from an accredited four-year college or university; or

b. have completed either (i) forty hours of Commission certified family and divorce mediation training; or (ii) forty hours of Commission-certified trial court mediation training and sixteen hours of Commission certified supplemental family and divorce mediation training; and be

1. a member in good standing of the North Carolina State Bar or a member similarly in good standing of the bar of another state and eligible to apply for admission to the North Carolina State Bar under Chapter 1, Subchapter C, of the North Carolina State Bar Rules and the Rules Governing the Board of Law Examiners and the Training of Law Students, 27 N.C. Admin. Code 1C.0105, with at least five years of experience after the date of licensure as a judge, practicing attorney, law professor, or mediator, or must possess equivalent experience;

2. a licensed psychiatrist under N.C.G.S. § 90-9.1, with at least five years of experience in the field after the date of licensure;

3. a licensed psychologist under N.C.G.S. §§ 90-270.1 to -270.22, with at least five years of experience in the field after the date of licensure;

4. a licensed marriage and family therapist under N.C.G.S. §§ 90-270.45 to -270.63, with at least five years of experience in the field after the date of licensure;

5. a licensed clinical social worker under N.C.G.S. § 90B-7, with at least five years of experience in the field after the date of licensure;

6. a licensed professional counselor under N.C.G.S. §§ 90-329 to -345, with at least five years of experience in the field after the date of licensure; or

7. an accountant certified in North Carolina, with at least five years of experience in the field after the date of certification.

(3) If the applicant is not licensed to practice law in one of the United States, then the applicant must have completed six hours of training on North Carolina legal terminology, court structure, and civil procedure, provided by a Commission-certified trainer. An attorney licensed to practice law in a state other than North Carolina shall satisfy this requirement by completing a self-study course, as directed by Commission staff.

(4) If the applicant is not licensed to practice law in North Carolina, then the applicant must provide three letters of reference to the Commission about the applicant's good character, including at least one letter from a person with knowledge of the applicant's professional practice and experience qualifying the applicant under subsection (a) of this rule.

(5) The applicant must have observed, as a neutral observer and with the permission of the parties, two mediations involving a custody or family financial issue conducted by a mediator who (i) is certified under these rules, (ii) has an Advanced Practitioner Designation from the ACR, or (iii) is a mediator certified by the NCAOC for custody matters. Mediations eligible for observation shall also include mediations conducted in matters prior to litigation of family financial disputes that are mediated by agreement of the parties and incorporate these rules.

If the applicant is not an attorney licensed to practice law in one of the United States, then the applicant must observe three additional mediations involving civil or family-related disputes, or disputes prior to litigation that are conducted by a Commission-certified mediator

and are conducted pursuant to a court order or an agreement of the parties incorporating the mediation rules of a North Carolina state or federal court.

All mediations shall be observed from their beginning until settlement, or until the point that an impasse has been declared, and shall be reported by the applicant on a Certificate of Observation - Family Financial Settlement Conference Program, Form AOC-DRC-08. All observers shall conform their conduct to the Commission's policy on *Guidelines for Observer Conduct*.

(6) The applicant must demonstrate familiarity with the statutes, rules, standards of practice, and standards of conduct governing mediated settlement conferences conducted in North Carolina.

(7) The applicant must be of good moral character and adhere to the Standards of Professional Conduct for Mediators when acting under these rules. On his or her application(s) for certification or application(s) for certification renewal, an applicant shall disclose any:

a. pending criminal charges;

b. criminal convictions;

c. restraining orders issued against him or her;

d. failures to appear;

e. pending or closed grievances or complaints filed with a professional licensing, certifying, or regulatory body, whether in North Carolina, another state, or another country;

f. disciplinary action taken against him or her by a professional licensing, certifying, or regulatory body, whether in North Carolina, another state, or another country, including, but not limited to, disbarment, revocation, decertification, or suspension of any professional license or certification, including the suspension or revocation of any license, certification, registration, or qualification to serve as a mediator in another state or country, even if stayed;

g. judicial sanctions imposed against him or her in any jurisdiction; or

h. civil judgments, tax liens, or bankruptcy filings that occurred within the ten years preceding the date that the initial or renewal application was filed with the Commission.

A mediator shall report to the Commission any of the above-enumerated matters arising subsequent to the disclosures reported on the initial or renewal application for certification within thirty days of receiving notice of the matter.

As referenced in this subsection, criminal charges or convictions (excluding infractions) shall include felonies, misdemeanors, or misdemeanor traffic violations (including driving while impaired) under the law of North Carolina or another state, or under the law of a federal, military, or foreign jurisdiction, regardless of whether adjudication was withheld (prayer for judgment continued) or the imposition of a sentence was suspended.

(8) The applicant must submit proof of the qualifications set out in this rule on a form provided by the Commission.

(9) The applicant must pay all administrative fees established by the NCAOC upon the recommendation of the Commission.

(10) The applicant must agree to accept the fee ordered by the court under Rule 7 as payment in full of a party's share of the mediator's fee.

(11) The applicant must comply with the requirements of the Commission for completing and reporting continuing mediator education or training.

(12) The applicant must agree, once certified, to make reasonable efforts to assist applicants for mediator certification in completing their observation requirements.

(b) No mediator who held a professional license and relied upon that license to qualify for certification under subsection (a)(2)(b) of this rule shall be decertified or denied recertification because the mediator's license lapses, is relinquished, or becomes inactive; provided, however, that this subsection shall not apply to a mediator whose professional license is revoked, suspended, lapsed, or relinquished, or whose professional license becomes inactive due to disciplinary action, or the threat of disciplinary action, from the mediator's licensing authority. Any mediator whose professional license is revoked, suspended, lapsed,

relinquished, or whose professional license becomes inactive shall report the matter to the Commission.

(c) A mediator's certification may be revoked or not renewed at any time if it is shown to the satisfaction of the Commission that a mediator no longer meets the qualifications set out in this rule or has not faithfully observed these rules or those of any judicial district in which he or she has served as a mediator. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible for certification under this rule. No application for certification renewal shall be denied on the ground that the mediator's training and experience does not satisfy a training and experience requirement promulgated after the date of the mediator's original certification.

Comment

Comment to Rule 8(a)(3). Commission staff has discretion to waive the requirements set out in Rule 8(a)(3) if an applicant can demonstrate sufficient familiarity with North Carolina legal terminology, court structure, and civil procedure.

Rule 9. Certification of Mediation Training Programs

(a) Certified training programs for mediators who are seeking certification under Rule 8(a)(2)(b) shall consist of a minimum of forty hours of instruction. The curriculum of such programs shall include the following topics:

(1) Conflict resolution and mediation theory.

(2) Mediation process and techniques, including the process and techniques of mediating family and divorce matters in district court.

(3) Communication and information gathering.

(4) Standards of conduct for mediators, including, but not limited to, the Standards of Professional Conduct for Mediators.

(5) Statutes, rules, and practices governing mediated settlement conferences for family financial matters in district court.

(6) Demonstrations of mediated settlement conferences, both with and without attorney involvement.

(7) Simulations of mediated settlement conferences, involving student participation as the mediator, attorneys, and disputants, which shall be supervised, observed, and evaluated by program faculty.

(8) An overview of North Carolina law as it applies to child custody and visitation, equitable distribution, alimony, child support, and postseparation support.

(9) An overview of family dynamics, the effect of divorce on children and adults, and child development.

(10) Protocols for screening cases for issues involving domestic violence and substance abuse.

(11) Satisfactory completion of an exam by all students testing their familiarity with the statutes, rules, and practices governing settlement procedures for family financial matters in district court.

(b) Certified training programs for mediators certified under Rule 8(a) shall consist of a minimum of sixteen hours of instruction and the curriculum shall include the topics listed in subsection (a) of this rule. There shall be at least two simulations as required by subsection (a)(7) of this rule.

(c) A training program must be certified by the Commission before a mediator's attendance at the program may be used to satisfy the training requirement under Rule 8(a). Certification does not need to be given in advance of attendance. Training programs attended prior to the promulgation of these rules, attended in other states, or approved by the ACR may be approved by the Commission if they are in substantial compliance with the standards set forth in this rule. The Commission may require attendees of an ACR-approved program to demonstrate compliance with the requirements of subsections (a)(5) and (a)(8) of this rule.

(d) To complete certification, a training program shall pay all administrative fees required by the NCAOC, in consultation with the Commission.

Rule 10. Other Settlement Procedures

(a) **Order Authorizing Other Settlement Procedures**. Upon receipt of a motion by the parties seeking authorization to utilize a settlement procedure in lieu of a mediated settlement conference, the court may order the use of the settlement procedures under subsection (b) of this rule, unless the court finds: that the parties did not agree on the procedure to be utilized, the neutral to conduct the procedure, or the neutral's compensation; or that the procedure selected is not appropriate for the case or the parties. A judicial settlement conference may be ordered only if permitted by local rule.

(b) **Other Settlement Procedures Authorized by These Rules**. In addition to a mediated settlement conference, the following settlement procedures are authorized by these rules:

(1) Neutral evaluation under Rule 11 (a settlement procedure in which a neutral offers an advisory evaluation of the case following summary presentations by each party).

(2) A judicial settlement conference under Rule 12 (a settlement procedure in which the court assists the parties in reaching their own settlement, if allowed by local rule).

(3) Other settlement procedures under Rule 13 (a settlement procedure described and authorized by local rule pursuant to Rule 13).

The parties may agree to arbitrate the dispute under the Family Law Arbitration Act, N.C.G.S. §§ 50-41 to 50-62, which shall constitute good cause for the court to dispense with the settlement procedures authorized under Rule 1(d).

(c) **General Rules Applicable to Other Settlement Procedures**.

(1) **When the Proceeding Is Conducted**. The neutral shall schedule and conduct the proceeding no later than 150 days from the issuance of the court's order, or no later than the deadline for completion set out in the court's order, unless the deadline is extended by the court. The neutral shall make an effort to schedule the proceeding at a time that is convenient to all participants. In the absence of agreement, the neutral shall select a date and time for the proceeding. The deadline for the completion of the proceeding shall be strictly observed by the neutral, unless the deadline is changed by written order of the court.

(2) **Extensions of Time**. A party or a neutral may request that the court extend the deadline for completion of the settlement proceeding. The request for an extension shall state the reasons the extension is sought and shall be served by the movant on the other parties and the neutral. The court may grant the extension and enter an order setting a new deadline for the completion of the settlement proceeding. A copy of the order shall be delivered to all parties and the neutral by the person who sought the extension.

(3) **Where the Proceeding Is Conducted**. Settlement proceedings shall be held in any location agreeable to the parties. If the parties cannot agree to a location, then the neutral shall be responsible for reserving a neutral place, making arrangements for the proceeding, and giving timely notice of the time and location of the proceeding to all attorneys and pro se parties.

(4) **No Delay of Other Proceedings.** Settlement proceedings shall not be the cause for a delay of other proceedings in the case, including, but not limited to, the conduct or completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the court.

(5) **Inadmissibility of Settlement Proceedings**. Evidence of statements made and conduct that occurs in a mediated settlement conference or other settlement proceeding conducted under this rule, whether attributable to a party, mediator, neutral, or neutral-observer present at the settlement proceeding, shall not be subject to discovery and shall be inadmissible in any proceeding in the case or in another civil dispute involving the same claim, except:

a. in proceedings for sanctions under subsection (c) of this rule;

b. in proceedings to enforce or rescind a settlement of the dispute;

c. in disciplinary proceedings before the North Carolina State Bar or any agency established to enforce the Standards of Professional Conduct for Mediators or standards of conduct for other neutrals; or

d. in proceedings to enforce laws concerning juvenile or elder abuse.

As used in this subsection, "neutral observer" includes persons seeking mediator certification, persons studying dispute resolution processes, and persons acting as interpreters.

No settlement agreement to resolve any or all issues reached at a proceeding conducted under this rule, or during its recesses, shall be enforceable unless the agreement has been reduced to writing, signed by the parties, and complies with the requirements of Chapter 50 of the

General Statutes of North Carolina. No evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a settlement proceeding.

No mediator, neutral, or neutral-observer present at a settlement proceeding under this rule shall be compelled to testify or produce evidence in any civil proceeding concerning statements made and conduct that occurs in anticipation of, during, or as a follow-up to a mediated settlement conference or other settlement proceeding under subsection (c) of this rule. This includes proceedings to enforce or rescind a settlement of the dispute, except to attest to the signing of any agreement, and during proceedings for sanctions under this section, proceedings to enforce laws concerning juvenile or elder abuse, and disciplinary hearings before the North Carolina State Bar or any agency established to enforce the Standards of Professional Conduct for Mediators or standards of conduct for other neutrals.

(6) **No Record Made**. There shall be no stenographic or other record made of any proceedings under these rules.

(7) **Ex Parte Communications Prohibited**. Unless all parties agree otherwise, there shall be no ex parte communication prior to the conclusion of the proceeding between the neutral and a party or a party's attorney on any matter related to the proceeding, except about administrative matters.

(8) **Duties of the Parties**.

a. **Attendance**. All parties and attorneys shall attend any settlement proceeding ordered by the court.

b. **Finalizing Agreement**.

1. If an agreement that resolves all issues in the dispute is reached at the neutral evaluation, judicial settlement conference, or other settlement proceeding, then the essential terms of the agreement shall be reduced to writing in a summary memorandum, unless the parties have reduced their agreement to writing in another form, signed the writing, and, in all other respects, complied with the requirements of Chapter 50 of the General Statutes of

North Carolina. The parties and the parties' attorneys shall use the summary memorandum to guide them in drafting any agreements or orders that may be required to give legal effect to the terms of their agreement. Within thirty days of the proceeding, all final agreements and other dispositive documents shall be executed by the parties and notarized, and all judgments or voluntary dismissals shall be filed with the court by such persons as the parties or the court designate.

2. If an agreement that resolves all issues in the dispute is reached prior to the neutral evaluation, judicial settlement conference, or other settlement proceeding, or is finalized while the proceeding is in recess, then the parties shall reduce the terms of the agreement to writing and sign the writing, along with their counsel. The agreement shall comply with the requirements of Chapter 50 of the General Statutes of North Carolina. Any consent judgment or voluntary dismissal disposing of all issues shall be filed with the court within thirty days of the proceeding or before the expiration of the deadline for completion of the proceeding, whichever is later.

3. When an agreement is reached upon all issues, all attorneys of record must notify the court within four business days of the settlement and advise the court who will sign the consent judgment or voluntary dismissal.

c. **Payment of the Neutral's Fee**. The parties shall pay the neutral's fee under subsection (c)(12) of this rule, except that no compensation shall be required for a judicial settlement conference.

(9) **Sanctions for Failure to Attend Other Settlement Procedure or Pay the Neutral's Fee**. Any person required to attend a settlement proceeding or pay a neutral's fee in compliance with N.C.G.S. § 7A-38.4A and these rules who fails to attend the proceeding or pay the neutral's fee without good cause shall be subject to

the contempt power of the court and any monetary sanctions imposed by the court. The monetary sanctions may include, but are not limited to, the payment of fines, attorneys' fees, the neutral's fee, expenses, and loss of earnings incurred by persons attending the settlement proceeding. A party seeking sanctions against a party, or the court on its own motion, shall do so in a written motion stating the grounds for the motion and the relief sought. The motion shall be served on all parties and any person against whom sanctions are being sought. If the court imposes sanctions, it shall do so after notice and a hearing in a written order making findings of fact, supported by substantial evidence, and conclusions of law.

(10) **Selection of Neutrals in Other Settlement Procedures**. The parties may select any person whom they believe can assist them with the settlement of their case to serve as a neutral in a settlement proceeding authorized under these rules, except in a judicial settlement conference.

Notice of the parties' selection shall be given to the court and to the neutral by filing a Motion for an Order to Use Settlement Procedure Other Than Mediated Settlement Conference or Judicial Settlement Conference in Family Financial Case, Form AOC-CV-826, at the scheduling and discovery conference or the court appearance during which potential settlement procedures are considered by the court. The motion shall state: (i) the name, address, and telephone number of the neutral selected; (ii) the rate of compensation of the neutral; and (iii) that the neutral and opposing counsel have agreed upon the selection and compensation.

If the parties are unable to select a neutral by agreement, then the court shall deny the motion and order the parties to attend a mediated settlement conference.

(11) **Disqualification of Neutrals**. Any party may move the court for an order disqualifying a neutral and, for good cause, an order disqualifying the neutral shall be entered. Good cause exists if the selected neutral has violated the standards of conduct of the North Carolina State Bar or any standards of conduct for neutrals adopted by the Supreme Court.

(12) **Compensation of Neutrals**. A neutral's compensation shall be paid in an amount agreed to by the parties and the neutral. Time spent reviewing materials in preparation for the neutral evaluation, conducting the proceeding, and making and reporting the award shall be compensable time. The parties shall not compensate a settlement judge.

(13) **Authority and Duties of the Neutral**.

a. **Authority of the Neutral**.

1. **Control of the Proceeding**. The neutral shall at all times be in control of the proceeding and the procedures to be followed.

2. **Scheduling the Proceeding**. The neutral shall make a good faith effort to schedule the proceeding at a time that is convenient to the participants, attorneys, and the neutral. In the absence of agreement, the neutral shall select the date and time for the proceeding. The deadline set by the court for the completion of the proceeding shall be strictly observed by the neutral, unless the deadline is changed by written order of the court.

b. **Duties of the Neutral**.

1. **Informing the Parties**. At the beginning of the proceeding, the neutral shall define and describe for the parties:

i. the process of the proceeding;

ii. the differences between the proceeding ordered by the court and other forms of conflict resolution;

iii. the costs of the proceeding;

iv. the admissibility of conduct and statements as provided by N.C.G.S. § 7A-38.1(*l*) and subsection (c)(5) of this rule; and

v. the duties and responsibilities of the neutral and the participants.

2. **Disclosure**. The neutral has a duty to be impartial and to advise all participants of any

circumstances bearing on possible bias, prejudice, or partiality.

3. **Reporting the Results of the Proceeding**. The neutral, settlement judge, or other type of neutral shall report the results of the proceeding to the court within ten days, using a Report of Neutral Conducting Settlement Procedure Other Than Mediated Settlement Conference in Family Financial Case, Form AOC-CV-834, in accordance with Rule 11 and Rule 12. The NCAOC, in consultation with the Commission, may require the neutral to provide statistical data for evaluation of other settlement procedures.

4. **Scheduling and Holding the Proceeding**. It is the duty of the neutral to schedule and conduct the proceeding prior to the completion deadline set out in the court's order. The deadline for completion of the proceeding shall be strictly observed by the neutral, unless the deadline is changed by a written order of the court.

Rule 11. Rules for Neutral Evaluation

(a) **Nature of Neutral Evaluation**. Neutral evaluation is an informal, abbreviated presentation of the facts and issues by the parties to a neutral at an early stage of the case. The neutral is responsible for evaluating the strengths and weaknesses of the case, providing a candid assessment of the merits of the case, the settlement value, and a dollar value or range of potential awards if the case proceeds to trial. The neutral is also responsible for identifying areas of agreement and disagreement and suggesting necessary and appropriate discovery.

(b) **When the Neutral Evaluation Conference Is to Be Held**. As a guiding principle, the neutral evaluation conference should be held at an early stage of the case, after the time for the filing of answers has expired but in advance of the expiration of the discovery period.

(c) **Preconference Submissions**. No later than twenty days prior to the date established for the neutral evaluation conference to begin, each party shall provide the neutral with written information about the case and shall certify to the neutral that they provided a copy of such summary to all other parties in the case. The information provided to

the neutral and the other parties shall be a summary of the significant facts and issues in the party's case and shall have attached to it copies of any documents supporting the parties' summary. Information provided to the neutral and to the other parties under this paragraph shall not be filed with the court.

(d) **Replies to Preconference Submissions**. No later than ten days prior to the date set for the neutral evaluation conference to begin, any party may, but is not required to, send additional information to the neutral in writing in response to a question from an opposing party. The response furnished to the neutral shall be served on all other parties and the party sending such response shall certify such service to the neutral, but the response shall not be filed with the court.

(e) **Neutral Evaluation Conference Procedure**. Prior to a neutral evaluation conference, the neutral may request additional information in writing from any party. At the conference, the neutral may address questions to the parties and give the parties an opportunity to complete their summaries with a brief oral statement.

(f) **Modification of Procedure**. Subject to the approval of the neutral, the parties may agree to modify the procedures required by these rules for neutral evaluation.

(g) **Neutral's Duties**.

(1) **Neutral's Opening Statement**. At the beginning of the neutral evaluation conference, in addition to the matters set out in Rule 10(c)(13)(b), the neutral shall define and describe for the parties:

a. the fact that the neutral evaluation conference is not a trial, that the neutral is not a judge, that the neutral's opinions are not binding on any party, and that the parties retain the right to a trial if they do not reach a settlement; and

b. the fact that any settlement reached will be only by mutual consent of the parties.

(2) **Oral Report to Parties by Neutral**. In addition to the written report to the court required under these rules, at the conclusion of the neutral evaluation conference, the neutral shall issue an oral report to the parties advising them of the neutral's opinion about the case. The opinion shall include a candid assessment of the merits of the case, an estimated settlement value, and the strengths

and weaknesses of each party's claims in the event that the case proceeds to trial. The oral report shall also contain a suggested settlement or disposition of the case and the reason for the neutral's suggestion. The neutral shall neither reduce his or her oral report to writing nor inform the court of the oral report.

(3) **Report of Neutral to Court**. Within ten days after the completion of the neutral evaluation conference, the neutral shall file a written report with the court using a NCAOC form. The report shall inform the court when and where the conference was held, the names of those who attended the conference, and the name of any party or attorney known by the neutral to have been absent from the conference without permission. The report shall also inform the court whether an agreement was reached by the parties. If a partial agreement is reached at the conference, then the report shall state the issues that remain for trial. In the event of a full or partial agreement, the report shall also state the name of the person designated to file the consent judgment or voluntary dismissal with the court. Local rules shall not require the neutral to send a copy of any agreement reached by the parties to the court.

(h) **Neutral's Authority to Assist in Negotiations**. If all parties to the neutral evaluation conference request and agree, then a neutral may assist the parties in settlement discussions. However, if the parties do not reach a settlement during such discussions, then the neutral shall complete the conference and make his or her written report to the court as if the settlement discussions had not occurred. If the parties reach an agreement at the conference, then they shall reduce their agreement to writing as required under Rule 10(c)(8)(b).

Rule 12. Rules for Judicial Settlement Conferences

(a) **Settlement Judge**. A judicial settlement conference shall be conducted by a district court judge who is selected by the chief district court judge of the judicial district. Unless specifically approved by the chief district court judge, the settlement judge shall not be assigned to try the case in the event that the case proceeds to trial.

(b) **Conducting the Judicial Settlement Conference**. The form and manner of conducting a judicial settlement conference shall be in the discretion of the settlement judge. The settlement judge may not

impose a settlement on the parties, but will assist the parties in reaching a resolution of all claims.

(c) **Confidential Nature of the Judicial Settlement Conference**. A judicial settlement conference shall be conducted in private. There shall be no stenographic or other recording of the conference. Persons other than the parties and their counsel may attend the conference only with the consent of all parties. The settlement judge shall not communicate with anyone regarding communications made during the conference, except that the settlement judge may report that a settlement was reached and, with the parties' consent, the terms of the settlement.

(d) **Report of the Settlement Judge**. Within ten days after the completion of the judicial settlement conference, the settlement judge shall file a written report with the court using a NCAOC form, stating when and where the conference was held, the names of those persons who attended the conference, and the name of any party or attorney known by the settlement judge to have been absent from the conference without permission. The report shall also inform the court whether an agreement was reached by the parties. If a partial agreement is reached at the conference, then the report shall state the issues that remain for trial. In the event of a full or partial agreement, the report shall also state the name of the person designated to file the consent judgment or voluntary dismissal with the court. Local rules shall not require the settlement judge to send a copy of any agreement reached by the parties to the court.

Rule 13. Local Rule Making

The chief district court judge of any district conducting settlement procedures under these rules is authorized to publish local rules, not inconsistent with these rules and N.C.G.S. § 7A-38.4A, implementing settlement procedures in that district.

Rule 14. Definitions

(a) "Court," as used throughout these rules, refers to a judge of the district court in the judicial district where a case is pending who has administrative responsibility for the case as the assigned or presiding judge or, as appropriate, the judge's designee.

(b) "NCAOC form" refers to a form prepared, printed, and distributed by the NCAOC to implement these rules, or a form approved by local rule which contains at least the same information as a form prepared by the NCAOC. Proposals for the creation or modification of a form may be initiated by the Commission.

(c) "Family financial case" refers to any civil case in district court in which a claim for equitable distribution, child support, alimony, or postseparation support is made, or in which there are claims arising out of contracts between the parties under N.C.G.S. §§ 50-20(d), 52-10, 52-10.1, or under Chapter 52B of the General Statutes of North Carolina.

Rule 15. Time Limits

Any time limit provided for by these rules may be waived or extended for good cause shown. Time shall be counted pursuant to the North Carolina Rules of Civil Procedure.

* * *

RULES OF MEDIATION FOR MATTERS BEFORE THE
CLERK OF SUPERIOR COURT

ORDER ADOPTING THE RULES OF MEDIATION FOR MATTERS BEFORE THE CLERK OF SUPERIOR COURT

Pursuant to subsection 7A-38.3B(b) of the General Statutes of North Carolina, the Court hereby adopts the Rules of Mediation for Matters Before the Clerk of Superior Court, which appear on the following pages. These rules supersede the Rules Implementing Mediation in Matters Before the Clerk of Superior Court, published at 367 N.C. 1109–24, and waived in part at 369 N.C. 977–78.

The Rules of Mediation for Matters Before the Clerk of Superior Court become effective on 1 March 2020.

This order shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 23rd day of January, 2020.

Mark A. Davis

For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 23rd day of January, 2020.

Amy L. Funderburk

AMY L. FUNDERBURK
Clerk of the Supreme Court

Rules of Mediation for Matters Before the Clerk of Superior Court

Rule 1. Mediation of Matters Before the Clerk of Superior Court

(a) **Purposes of Mandatory Mediation**. These rules are promulgated under N.C.G.S. § 7A-38.3B to implement mediation in certain cases within the jurisdiction of the clerk of superior court. The procedures set out in these rules are designed to focus the parties' attention on settlement and resolution, rather than on preparation for contested hearings, and to provide a structured opportunity for settlement negotiations to take place. Nothing in these rules is intended to limit or prevent the parties from engaging in other settlement efforts voluntarily, either prior to, or after, the filing of a matter with the clerk.

(b) **Duty of Counsel to Consult with Clients and Opposing Counsel Concerning Settlement Procedures**. In furtherance of the purposes set out in subsection (a) of this rule, upon being retained to represent a party to a matter before the clerk, counsel shall discuss the options available to the parties to resolve their dispute through mediation and other settlement procedures without resort to a contested hearing. Counsel shall also discuss which settlement procedure and third party neutral would best suit their clients and the matter in dispute.

(c) **Initiating the Mediation by Order of the Clerk**.

(1) **Order of the Clerk**. The clerk of any county may, using an Order Regarding Mediation in Matters Before Clerk of Superior Court, Form AOC-G-301, order all persons identified in Rule 4 to attend mediation in any matter in which the clerk has original or exclusive jurisdiction, except in matters under Chapter 45 and Chapter 48 of the General Statutes of North Carolina and matters in which the jurisdiction of the clerk is ancillary.

(2) **Content of the Order**. The order shall:

a. require that a mediation be held in the case;

b. establish deadlines for the selection of a mediator and completion of the mediation;

c. state the names of the persons who shall attend the mediation;

d. state clearly that the persons ordered to attend the mediation have the right to select their own mediator, as provided by Rule 2;

e. state the rate of compensation of the court-appointed mediator, if the parties do not exercise their right to select a mediator under Rule 2; and

f. state that the parties shall be required to pay the mediator's fee in shares determined by the clerk.

(3) **Motion for Court-Ordered Mediation**. In matters not ordered to mediation, any party, interested person, or fiduciary may file a written motion with the clerk requesting that mediation be ordered. The motion shall state the reasons why the order should be allowed and shall be served in accordance with Rule 5 of the North Carolina Rules of Civil Procedure on the nonmovant, interested persons, and fiduciaries designated by the clerk or identified by the petitioner in the pleadings. Objections to the motion may be filed in writing within five days after the date of service of the motion. Thereafter, the clerk shall rule on the motion without a hearing and notify the parties or their attorneys of the ruling.

(4) **Informational Brochure**. The clerk shall provide the parties with a brochure prepared by the Dispute Resolution Commission (Commission) explaining the mediation process and the operations of the Commission, along with a copy of both the order under subsection (c)(1) of this rule and the motion under subsection (c)(3) of this rule.

(5) **Motion to Dispense with Mediation**. A named party, interested person, or fiduciary may move the clerk to dispense with a mediation ordered by the clerk. The motion shall state the reasons that relief is sought and shall be served on all persons ordered to attend the mediation and the mediator. For good cause shown, the clerk may grant the motion.

(6) **Dismissal of Petition for Adjudication of Incompetence**. The petitioner shall not voluntarily dismiss a petition for adjudication of incompetence after a mediation is ordered.

Rule 2. Designation of the Mediator

(a) **Designation of a Mediator by Agreement of the Parties**. By agreement, the parties may designate a mediator certified by the Commission within the time period set out in the clerk's order. However,

in estate and guardianship matters, the parties may designate only those mediators who are certified under these rules for estate and guardianship matters.

A Designation of Mediator in Matter Before Clerk of Superior Court, Form AOC-G-302 (Designation Form), must be filed within the time period set out in the clerk's order. The petitioner should file the Designation Form; however, any party may file the Designation Form. The party filing the Designation Form shall serve a copy on all parties and the mediator designated to conduct the mediation. The Designation Form shall state: (i) the name, address, and telephone number of the mediator designated; (ii) the rate of compensation of the mediator; (iii) that the mediator and the persons ordered to attend the mediation have agreed on the designation and the rate of compensation; and (iv) under which rules the mediator is certified.

(b) **Appointment of a Mediator by the Clerk**. In the event that a Designation Form is not filed with the clerk within the time period for filing stated in the clerk's order, the clerk shall appoint a mediator certified by the Commission. The clerk shall appoint only those mediators certified under these rules for estate and guardianship matters to those matters. The clerk may appoint any certified mediator who has expressed a desire to be appointed to mediate all other matters within the jurisdiction of the clerk.

Except for good cause, mediators shall be appointed by the clerk by rotation from a list of those certified mediators who wish to be appointed for matters within the clerk's jurisdiction, without regard to occupation, race, gender, religion, national origin, disability, or whether the mediator is an attorney.

As part of the application or annual certification renewal process, all mediators shall designate those counties for which they are willing to accept court appointments. Each designation shall be deemed to be a representation that the designating mediator has read and will abide by the local rules for, and will accept appointments from, the designated county and will not charge for travel time and expenses incurred in carrying out his or her duties associated with those appointments. A mediator's refusal to accept an appointment in a county designated by the mediator may be grounds for removal from that county's court-appointment list by the Commission or by the clerk of that county.

The Commission shall provide to the clerk of each county a list of superior court mediators requesting appointments in that county who are certified in estate and guardianship proceedings, and those certified

in other matters before the clerk. The list shall contain each mediator's name, address, and telephone number. The list shall be provided to the clerks electronically on the Commission's website at https://www.ncdrc.gov. The Commission shall promptly notify the clerk of any disciplinary action taken with respect to a mediator on the list of certified mediators for the county.

(c) **Mediator Information Directory**. The Commission shall maintain for the consideration of the clerks, and those designating mediators for matters within the clerk's jurisdiction, a directory of certified mediators who request appointments in those matters and a directory of mediators who are certified under these rules. The directory shall be provided to the clerks on the Commission's website at https://www.ncdrc.gov.

(d) **Disqualification of the Mediator**. Any person ordered to attend a mediation under these rules may move the clerk of the county in which the matter is pending for an order disqualifying the mediator. For good cause, an order disqualifying the mediator shall be entered. If the mediator is disqualified, a replacement mediator shall be designated or appointed under this rule. Nothing in this subsection shall preclude a mediator from disqualifying himself or herself.

Rule 3. The Mediation

(a) **Where the Mediation Is to Be Held**. The mediated settlement conference shall be held in any location agreeable to the parties and the mediator. If the parties cannot agree on a location, then the mediator shall be responsible for reserving a neutral place in the county where the action is pending, for making arrangements for the conference, and for giving timely notice of the time and location of the conference to all attorneys, pro se parties, and other persons required to attend.

(b) **When the Mediation Is to Be Held**. The clerk's order issued under Rule 1(c)(3) shall state a deadline for completion of the mediation. The mediator shall set a date and time for the mediation under Rule 6(b)(5) and shall conduct the mediation before the deadline, unless the deadline is extended by the clerk.

(c) **Extending Deadline for Completion**. The clerk may extend the deadline for completion of the mediation upon the clerk's own motion, upon stipulation by the parties, or upon the suggestion of the mediator.

(d) **Recesses**. The mediator may recess the mediation at any time and may set times for reconvening that are prior to the deadline for

completion. If the time for reconvening is set before the mediation is recessed, then no further notification is required for persons present at the mediation.

(e) **The Mediation Is Not to Delay Other Proceedings**. The mediation shall not be the cause for the delay of other proceedings in the case, including the completion of discovery, the filing or hearing of motions, or the hearing of the matter, except by order of the clerk.

Rule 4. Duties of Parties, Attorneys, and Other Participants in Mediations

(a) **Attendance**.

(1) All persons ordered by the clerk to attend a mediation conducted under these rules shall physically attend the mediation until either an agreement is reduced to writing and signed, as provided in subsection (b) of this rule, or an impasse has been declared. Any person required to attend the mediation may have the attendance requirement excused or modified, including the allowance of that person's participation by telephone or teleconference, by:

a. agreement of all persons ordered to attend the mediation and the mediator; or

b. order of the clerk, upon the motion of a person ordered to attend the mediation and notice to all other persons ordered to attend the mediation and the mediator.

(2) Any nongovernmental entity ordered to attend a mediation conducted under these rules shall be represented at the mediation by an officer, employee, or agent who is not the entity's outside counsel and who has authority to decide on behalf of the entity whether, and on what terms, to settle the matter.

(3) Any governmental entity ordered to attend a mediation conducted under these rules shall be represented at the mediation by an employee or agent who is not the entity's outside counsel and who has authority to decide on behalf of the entity whether, and on what terms, to settle the matter; provided, however, that if proposed settlement terms can be approved only by a governing board, the employee or agent shall have authority to negotiate on behalf of the governing board.

(4) An attorney ordered to attend a mediation under these rules has satisfied the attendance requirement when at least one counsel of record for any person ordered to attend has attended the mediation.

(5) Other persons may participate in a mediation at the discretion of the mediator.

(6) Persons ordered to attend a mediation shall promptly notify the mediator, after selection or appointment, of any significant problems they have with the dates for mediation sessions before the completion deadline, and shall inform the mediator of any problems that arise before an anticipated mediation session is scheduled by the mediator.

(b) **Finalizing Agreement**.

(1) If an agreement is reached at the mediation, in matters that, as a matter of law, may be resolved by the parties by agreement, then the parties to the agreement shall reduce the terms of the agreement to writing and sign the writing along with their counsel. The parties shall designate a person who will file a consent judgment or a voluntary dismissal with the clerk, and that person shall sign the mediator's report. If an agreement is reached prior to or during a recess of the mediation, then the parties shall inform the mediator and the clerk that the matter has been settled and, within ten calendar days of the agreement, file a consent judgment or voluntary dismissal with the court.

(2) In all other matters, including guardianship and estate matters, if an agreement is reached upon some or all of the issues at the mediation, then the persons ordered to attend the mediation shall reduce the terms of the agreement to writing and sign the writing along with their counsel, if any. Such agreements are not binding upon the clerk, but may be offered into evidence at the hearing of the matter and may be considered by the clerk for a just and fair resolution of the matter. Evidence of statements made and conduct occurring in a mediation where an agreement is reached is admissible under N.C.G.S. § 7A-38.3B(g)(3).

All written agreements reached in such matters shall include the following language in a prominent

location in the document: "This agreement is not binding on the clerk but will be presented to the clerk as an aid to reaching a just resolution of the matter."

(c) **Payment of the Mediator's Fee**. The persons ordered to attend the mediation shall pay the mediator's fee as provided by Rule 7.

(d) **No Recording**. There shall be no stenographic, audio, or video recording of the mediation process by any participant. This prohibition includes recording either surreptitiously or with the agreement of the parties.

Rule 5. Sanctions for Failure to Attend Mediation or Pay the Mediator's Fee

Any person ordered to attend a mediation under these rules who fails to attend or to pay a portion of the mediator's fee in compliance with N.C.G.S. § 7A-38.3B and these rules without good cause shall be subject to the contempt power of the clerk and any monetary sanctions imposed by the clerk. The monetary sanctions may include, but are not limited to, the payment of fines, attorneys' fees, the mediator's fee, expenses, and loss of earnings incurred by persons attending the mediation.

Any person seeking sanctions against another person shall do so in a written motion stating the grounds for the motion and the relief sought. The motion shall be served upon all persons ordered to attend the mediation. The clerk may initiate proceedings for sanctions upon his or her own motion by the entry of a show cause order. If the clerk imposes sanctions, then the clerk shall do so, after notice and a hearing, in a written order making findings of fact and conclusions of law. An order imposing sanctions is reviewable by the superior court under N.C.G.S. §§ 1-301.2 to 301.3, and by the appellate courts under N.C.G.S. § 7A-38.1(g).

Rule 6. Authority and Duties of the Mediator

(a) **Authority of the Mediator**.

(1) **Control of the Mediation**. The mediator shall at all times be in control of the mediation and the procedures to be followed. The mediator's conduct shall be governed by the Standards of Professional Conduct for Mediators.

(2) **Private Consultation**. The mediator may communicate privately with any participant or counsel prior to, during, and after the mediation. The fact that private communications have occurred with a participant before the

conference shall be disclosed to all other participants at the beginning of the mediation.

(b) **Duties of the Mediator**.

(1) **Informing the Parties**. At the beginning of the mediation, the mediator shall define and describe for the parties:

a. the process of mediation;

b. the costs of mediation and the circumstances in which participants will not be assessed the costs of mediation;

c. the fact that the mediation is not a trial, that the mediator is not a judge, and that the parties retain the right to a hearing if they do not reach a settlement;

d. the circumstances under which the mediator may meet and communicate privately with the parties or with any other person;

e. whether, and under what conditions, communications with the mediator will be held in confidence during the conference;

f. the inadmissibility of conduct and statements under N.C.G.S. § 7A-38.3B;

g. the duties and responsibilities of the mediator and the participants; and

h. the fact that any agreement reached will be reached by mutual consent and reported to the clerk under subsection (b)(4) of this rule.

(2) **Disclosure**. The mediator has a duty to be impartial and to advise all participants of any circumstances bearing on possible bias, prejudice, or partiality.

(3) **Declaring Impasse**. It is the duty of the mediator to determine in a timely manner when an impasse exists and when the mediation should end. The mediator shall inquire of and consider the desires of the parties to cease or continue the mediation.

(4) **Reporting Results of the Mediation**.

a. The mediator shall report to the court in writing on a form prescribed by the North Carolina

Administrative Office of the Courts (NCAOC) within five days of completing the mediation whether the mediation resulted in settlement or whether an impasse was declared. If settlement occurred prior to or during a recess of the mediation, then the mediator shall file the report of settlement within five days of receiving notice of the settlement and, in addition to the other information required, report on who informed the mediator of the settlement.

b. The mediator's report shall identify those persons attending the mediation, the time spent conducting the mediation and fees charged for the mediation, and the names and contact information of the persons designated by the parties to file a consent judgment or dismissal with the clerk, as required by Rule 4(b). Mediators shall provide statistical data for evaluation of the mediation program as required from time to time by the Commission or the NCAOC. Mediators shall not be required to send agreements reached in mediation to the clerk, except in estate and guardianship matters and other matters which may be resolved only by order of the clerk.

c. Mediators who fail to report as required under this rule shall be subject to the contempt power of the court and sanctions.

(5) **Scheduling and Holding the Mediation**. It is the duty of the mediator to schedule and conduct the mediation prior to the mediation completion deadline set out in the clerk's order. The mediator shall make an effort to schedule the mediation at a time that is convenient to all participants. In the absence of agreement, the mediator shall select a date and time for the mediation. The deadline for completion of the mediation shall be strictly observed by the mediator, unless the deadline is changed by a written order of the clerk.

Rule 7. Compensation of the Mediator

(a) **By Agreement**. When the mediator is stipulated to by the parties, compensation shall be as agreed upon between the parties and the mediator.

(b) **By Order of the Clerk**. When the mediator is appointed by the clerk, the parties shall compensate the mediator for mediation services at the rate of $150 per hour. The parties shall also pay the mediator a one-time, per-case administrative fee of $150, due upon appointment.

(c) **Payment of Compensation**. In matters within the clerk's jurisdiction that, as a matter of law, may be resolved by the parties by agreement, the mediator's fee shall be paid in equal shares by the parties, unless otherwise agreed to by the parties. Payment shall be due upon completion of the mediation.

In all other matters before the clerk, including guardianship and estate matters, the mediator's fee shall be paid in shares determined by the clerk. A share of a mediator's fee may only be assessed against the estate of a decedent, a trust or guardianship, or against a fiduciary or interested person upon the entry of a written order making specific findings of fact justifying the assessment of costs.

(d) **Change of Appointed Mediator**. Parties who fail to select a certified mediator within the time set out in the clerk's order, but desire a substitution after the clerk has appointed a certified mediator, shall obtain the approval of the clerk for the substitution. The clerk may approve the substitution only upon proof of payment to the clerk's original appointee of the $150 one-time, per-case administrative fee, any other amount owed for mediation services under subsection (b) of this rule, and any postponement fee owed under subsection (f) of this rule, unless the clerk determines that payment of the fees would be unnecessary or inequitable.

(e) **Indigent Cases**. No person ordered to attend a mediation found to be indigent by the clerk for purposes of these rules shall be required to pay a share of the mediator's fee. Any person ordered by the clerk to attend a mediation may move the clerk for a finding of indigency and ask to be relieved of that person's obligation to pay a share of the mediator's fee. The motion shall be heard subsequent to the completion of the mediation, or if the parties do not settle their dispute, subsequent to the conclusion of the dispute. In ruling upon the motion, the clerk shall apply the criteria enumerated in N.C.G.S. § 1-110(a), but shall take into consideration the outcome of the dispute and whether a decision was rendered in the movant's favor. The clerk shall enter an order granting or denying the person's request for a finding of indigency. Any mediator conducting a mediation under these rules shall waive the fee requirement for persons found by the court to be indigent.

(f) **Postponements**.

(1) As used in subsection (f) of this rule, "postponement" means to reschedule or not proceed with a mediation once a date for the mediation has been scheduled by the mediator. After a mediation has been scheduled for a specific date, a person ordered to attend may not unilaterally postpone the mediation.

(2) A mediation may be postponed by the mediator for good cause only after notice by the movant to all persons of the reason for the postponement and a finding of good cause by the mediator. Upon a finding of good cause, a postponement fee shall not be assessed.

(3) Without a finding of good cause, a mediator may postpone a scheduled mediation session with the consent of all parties. If the mediation is postponed, a postponement fee of $150 shall be paid to the mediator. However, if the mediation is postponed within two business days of the scheduled date, then the postponement fee shall be $300. Postponement fees shall be paid by the party requesting the postponement. If it is not possible to determine who is responsible, then the clerk shall assess responsibility. Postponement fees are in addition to the one-time, per-case administrative fee provided for in subsection (b) of this rule. A postponement fee shall not be assessed when the mediator is responsible for the postponement.

(4) If all persons ordered to attend the mediation select the mediator and they contract with the mediator as to compensation, then the parties and the mediator may specify in their contract alternatives to the postponement fees otherwise required by subsection (f) of this rule.

(g) **Sanctions for Failure to Pay the Mediator's Fee**. Willful failure of a party to make timely payment of that party's share of the mediator's fee (whether the one-time, per-case administrative fee, the hourly fee for mediation services, or any postponement fee), or willful failure of a party contending indigent status to promptly move the clerk for a finding of indigency, shall constitute contempt of court and may result, after notice and a hearing, in the imposition of sanctions by the court under Rule 5.

Rule 8. Mediator Certification and Decertification

(a) The Commission may receive and approve applications for the certification of persons to be appointed as mediators for matters before the clerk.

(b) To be appointed by the clerk as a mediator in all cases within the clerk's jurisdiction, except in guardianship and estate matters, a person shall be certified by the Commission for either the superior or district court mediation programs.

(c) To be appointed by the clerk as a mediator in guardianship and estate matters within the clerk's jurisdiction, a person shall be certified as a mediator by the Commission for either superior or district court mediation programs and complete a course, at least ten hours in length and approved by the Commission under Rule 9, concerning estate and guardianship matters within the clerk's jurisdiction.

(d) To be approved as a mediator by the Commission under subsections (b) or (c) of this rule, a person shall also:

(1) submit proof of all qualifications set out in this rule on a form provided by the Commission;

(2) pay all administrative fees established by the NCAOC upon the recommendation of the Commission; and

(3) agree to accept the fee ordered by the clerk under Rule 7 as payment in full of a party's share of the mediator's fee.

(e) A mediator's certification may be revoked or not renewed whenever it is shown to the satisfaction of the Commission that a mediator no longer meets the qualifications described in this rule or has not faithfully observed these rules, those of any county in which he or she has served as a mediator, or the Standards of Professional Conduct for Mediators. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible for certification as a mediator under this rule.

Rule 9. Certification of Mediation Training Programs

(a) Certified training programs for mediators who are seeking certification as a mediator under these rules for estate and guardianship matters within the jurisdiction of the clerk shall consist of a minimum of ten hours of instruction. The curriculum of such programs shall include the following topics:

(1) Factors distinguishing estate and guardianship mediation from other types of mediation.

(2) The aging process and societal attitudes toward the elderly, disabled, and persons with a mental illness.

(3) How to ensure full participation of respondents and identifying interested persons and nonparty participants.

(4) Medical concerns of the elderly, disabled, and persons with a mental illness.

(5) Financial and accounting concerns in the administration of estates and financial accounting concerns of the elderly, disabled, and persons with a mental illness.

(6) Family dynamics relative to the elderly, disabled, and persons with a mental illness, and relative to deceased persons.

(7) How to assess physical and mental capacity.

(8) The availability of community resources for the elderly, disabled, and persons with a mental illness.

(9) Principles of guardianship law and procedure.

(10) Principles of estate law and procedure.

(11) Statutes, rules, and forms applicable to mediation conducted under these rules.

(12) Ethical and conduct issues relevant to mediations conducted under these rules.

The Commission may adopt guidelines for trainers amplifying these topics and may set out minimum time frames and materials that trainers shall allocate to each topic. The guidelines shall be available at the Commission's office and posted on the Commission's website at https://www.ncdrc.gov.

(b) A training program must be certified by the Commission before a mediator's attendance at the program may be used to satisfy the training requirement under Rule 8(c). Certification does not need to be given in advance of attendance. Training programs attended prior to the promulgation of these rules or attended in other states may be approved by the Commission if they are in substantial compliance with the standards set forth in this rule.

(c) To complete certification, a training program shall pay all administrative fees required by the NCAOC, in consultation with the Commission.

Rule 10. Procedural Details

The clerk shall make all orders that are just and necessary to safeguard the interests of all persons, and may supplement all necessary procedural details in a manner that is not inconsistent with these rules.

Rule 11. Definitions

(a) "Clerk," as used throughout these rules, refers to the clerk of superior court or, as appropriate, the clerk's assistant or designee.

(b) "NCAOC form" refers to a form prepared, printed, and distributed by the NCAOC to implement these rules, or a form approved by local rule which contains at least the same information as a form prepared by the NCAOC. Proposals for the creation or modification of a form may be initiated by the Commission.

Rule 12. Time Limits

Any time limit provided for by these rules may be waived or extended for good cause shown. Service of papers and computation of time shall be governed by the North Carolina Rules of Civil Procedure.

* * *

ORDER ADOPTING THE RULES OF MEDIATION FOR MATTERS IN DISTRICT CRIMINAL COURT

Pursuant to subsection 7A-38.3D(d) of the General Statutes of North Carolina, the Court hereby adopts the Rules of Mediation for Matters in District Criminal Court, which appear on the following pages. These rules supersede the Rules Implementing Mediation in Matters Pending in District Criminal Court, published at 367 N.C. 1125–38.

The Rules of Mediation for Matters in District Criminal Court become effective on 1 March 2020.

This order shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 23rd day of January, 2020.

Mark A. Davis
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 23rd day of January, 2020.

Amy L. Funderburk
AMY L. FUNDERBURK
Clerk of the Supreme Court

Rules of Mediation for Matters in District Criminal Court

Rule 1. Voluntary Mediation of Criminal Matters in District Court

(a) **Purposes of Mediation**. These rules are promulgated under N.C.G.S. § 7A-38.3D to implement programs for voluntary mediation of certain criminal cases within the jurisdiction of the district court. The procedures in these rules are intended to assist private parties, with the help of a neutral mediator, in discussing and resolving their disputes and in conserving judicial resources. The chief district court judge, the district attorney, and the community mediation center shall determine whether to establish a program in a district court judicial district. Because participation in this program and in the mediation process is voluntary, no defendant, complaining witness, or any other person who declines to participate in mediation, or whose case cannot be settled in mediation, shall face any adverse consequences as a result of his or her failure to participate or reach an agreement. Consistent with N.C.G.S. § 7A-38.3D(j), a party's participation or failure to participate in mediation must be held confidential and not revealed to the court or the district attorney.

(b) **Definitions**.

(1) **Court**. "Court," as used throughout these rules, refers to a district court judge or, as appropriate, the judge's designee.

(2) **Mediation Process**. "Mediation process," as used throughout these rules, encompasses intake, screening, and mediation until either an impasse is declared or the case is dismissed.

(3) **District Attorney**. "District attorney," as used throughout these rules, refers to the district attorney, an assistant district attorney, or any staff member or designee of the district attorney.

(c) **Initiating the Mediation**.

(1) **Suggestion by the Court**. In judicial districts that establish a voluntary mediation program, the court may encourage private parties to attend mediation. In determining whether to encourage mediation, the court should consider:

a. whether the parties are willing to participate;

b. whether continuing prosecution is in the best interests of the parties or any nonparties impacted by the dispute;

c. whether the parties involved in the dispute have an expectation of a continuing relationship and whether there is an issue underlying their dispute that has not been addressed and which may create later conflict or require court involvement;

d. whether cross-warrants have been filed in the case; and

e. whether the case might otherwise be subject to voluntary dismissal.

(2) **Multiple Charges**. Multiple charges pending in the same court against a single defendant, or pending against multiple defendants and involving the same complainant or complainants, may be consolidated for the purpose of holding a single mediation in the matter. Charges pending in multiple courts may be consolidated for purposes of mediation with the consent of those courts.

(3) **Timing of Suggestion**. The court shall encourage parties to attend and participate in mediation as soon as practicable. Since there is no possibility of incarceration resulting from any agreement reached in mediation, the court is not required to provide a court-appointed attorney to a defendant prior to mediation.

(4) **Notice to Parties**. When the parties have agreed to attend mediation, the court shall provide notice to the parties, either orally or in writing on a form prescribed by the North Carolina Administrative Office of the Courts (NCAOC), of the following: (i) the deadline for completion of the mediation process, (ii) the name of the mediator who will mediate the dispute or the name of the community mediation center who will provide the mediator, and (iii) the fact that the defendant may be required to pay the dismissal fee set forth in Rule 5(b)(2). In lieu of providing this information orally or in writing, the court may refer the complaining witness and defendant to a community mediation center, whose staff shall advise the parties of the above information.

(5) **Motion for Mediation**. Any complainant or defendant may move the court, either orally or in writing, to have a mediation conducted in his or her dispute. If the motion is in writing, then the motion may be on a NCAOC form. The court shall determine whether the dispute is appropriate for referral to mediation.

(6) **Screening**. After a screening of the case or parties, a mediator or a community mediation center to which the parties are referred for mediation shall advise the court if the matter is not appropriate for mediation.

Rule 2. Program Administration

Under N.C.G.S. § 7A-38.3D(c), a community mediation center may assist a judicial district in administering and operating its mediation program for criminal matters in district court. The court may delegate to a center responsibility for the scheduling of cases and the center may provide volunteer and/or staff mediators to conduct the mediations. The center shall also maintain files in such mediations; record caseload statistics and other information as required by the court, the Dispute Resolution Commission (Commission), or the NCAOC, including tracking the number of cases referred to mediation and the outcome of those mediations; and, in accordance with N.C.G.S. § 7A-38.7 and N.C.G.S. § 7A-38.3D(m), oversee the dismissal process for cases resolved in mediation.

Rule 3. Appointment of the Mediator

(a) **Authority to Appoint**. When the parties have agreed to attend mediation, the court shall appoint a mediator provided by a community mediation center, or shall designate a center to appoint a mediator to conduct the mediation. The mediator appointed shall be certified under Rule 7 or shall be working toward certification under the supervision of the center to which the dispute is referred for mediation.

(b) **Disqualification of the Mediator**. For good cause shown, a complainant or defendant may move the court to disqualify the mediator appointed to conduct the mediation. If the mediator is disqualified, then the court shall appoint a new mediator to conduct the mediation. Nothing in this subsection precludes a mediator from disqualifying himself or herself.

Rule 4. The Mediation

(a) **Scheduling the Mediation**. The mediator appointed to conduct the mediation, or the community mediation center to which the matter has been referred by the court for appointment of a mediator,

shall be responsible for any scheduling that must be done prior to the mediation, any reporting required by these rules or local rules, and for maintaining any files that pertain to the mediation.

(b) **Where the Mediation Is to Be Held**. Mediation shall be held in the courthouse or, if a suitable space is available, in the offices of a community mediation center, or at any other place agreed upon by the mediator and parties.

(c) **Extending the Deadline for Completion**. The court may extend the deadline for completion of the mediation process upon its own motion or upon the suggestion of community mediation center staff.

(d) **Recesses**. The mediator may recess the mediation at any time and may set times for reconvening. If the time for reconvening is set before the mediation is recessed, then no further notification is required for persons present at the mediation. In recessing a matter, the mediator shall consider whether the parties wish to continue the mediation and whether they are making progress toward resolving their dispute.

(e) **No Recording**. There shall be no stenographic, audio, or video recording of the mediation process by any participant. This prohibition includes recording either surreptitiously or with the agreement of the parties.

Rule 5. Duties of the Parties

(a) **Attendance**.

(1) **Physical Attendance Required**. A complainant or defendant who has agreed to attend mediation must physically attend the proceeding until an agreement is reached or the mediator has declared an impasse.

(2) **Attendees**. The following persons may attend and participate in mediation:

a. **Parents or Guardians of a Minor Party**. A parent or guardian of a minor complainant or defendant who has been encouraged by the court to attend may attend and participate in mediation. However, the court shall encourage attendance by a parent or guardian only in consultation with the mediator, and the mediator may later excuse the participation of a parent or guardian if the mediator determines that the parent or guardian's presence is not helpful to the process.

b. **Attorneys**. Attorneys representing the parties may physically attend and participate in mediation. Attorneys may also participate by advising clients before, during, and after mediation sessions, including monitoring compliance with any agreement reached.

c. **Others**. In the mediator's discretion, others whose presence and participation is deemed helpful either to resolving the dispute or addressing an issue underlying it may be permitted to attend and participate, unless and until the mediator determines that their presence is no longer helpful. Mediators may exclude anyone wishing to attend and participate, but whose presence and participation the mediator deems would likely be disruptive or counterproductive.

(3) **Exceptions to Physical Attendance**. A party or other person may be excused from physically attending the mediation and may be allowed to participate either by telephone or through an attorney:

a. by agreement of the complainant, defendant, and mediator; or

b. by order of the court.

(4) **Scheduling**. The complainant and defendant, and any parent, guardian, or attorney who will be attending the mediation, will:

a. make a good faith effort to cooperate with the mediator or community mediation center to schedule the mediation at a time that is convenient to all participants;

b. promptly notify the mediator or community mediation center of any significant scheduling concerns that may impact that person's ability to be present for mediation; and

c. notify the mediator or the community mediation center about any other concern that may impact a person's ability to attend and meaningfully participate—for example, the need for wheelchair access or for a deaf or foreign language interpreter.

(b) **Finalizing Agreement**.

(1) **Written Agreement**. If an agreement is reached at the mediation, then the complainant and defendant are to ensure that the terms of the agreement are reduced to writing and signed by the parties. Agreements that are not reduced to writing and signed will not be enforceable. If no agreement is reached in mediation, an impasse will be declared and the matter will be referred back to the court.

(2) **Dismissal Fee**. For charges to be dismissed by the district attorney, unless the parties agree to some other apportionment, the defendant shall pay a dismissal fee, as set out in N.C.G.S. § 7A-38.7 and N.C.G.S. § 7A-38.3D(m), to the clerk of superior court in the county where the case was filed and supply proof of payment to the community mediation center administering the program for the judicial district. Payment is to be made in accordance with the terms of the parties' agreement. The center shall, thereafter, provide the district attorney with a dismissal form, which may be a NCAOC form. In its discretion, the court may waive the dismissal fee under N.C.G.S. § 7A-38.3D(m) when the defendant is indigent, unemployed, a full-time college or high school student, a recipient of public assistance, or for any other appropriate reason. The mediator shall advise the parties where and how to pay the fee.

Rule 6. Authority and Duties of the Mediator

(a) **Authority of the Mediator.**

(1) **Control of the Mediation**. The mediator shall at all times be in control of the mediation process and the procedures to be followed. The mediator's conduct shall be governed by the Standards of Professional Conduct for Mediators.

(2) **Private Consultatio**n. The mediator may communicate privately with any participant or counsel prior to, and during, the mediation. The fact that a private communication has occurred with a participant shall be disclosed to all other participants at the beginning of the mediation.

(3) **Inclusion and Exclusion of Participants at the Mediation**. In the mediator's discretion, the mediator

may encourage or allow persons other than the parties or their attorneys to attend and participate in the mediation, provided that the mediator has determined the presence of such persons to be helpful in resolving the dispute or addressing an issue underlying it. Mediators may also exclude persons other than the parties and their attorneys whose presence the mediator deems would likely be, or which has been, counterproductive.

(4) **Scheduling the Mediation**. The mediator or community mediation center staff involved in scheduling, shall make a good faith effort to schedule the mediation at a time that is convenient to the parties and any parent, guardian, or attorney who will be attending. In the absence of agreement, the mediator or staff member shall select the date for the mediation and notify those who will be participating. Parties are to cooperate with the mediator in scheduling the mediation, including providing information as required by Rule 5(a)(4).

(b) **Duties of the Mediator**.

(1) **Informing the Parties**. At the beginning of the mediation, the mediator shall define and describe for the parties:

a. the process of mediation;

b. the fact that mediation is not a trial and that the mediator is not a judge, attorney, or therapist;

c. the fact that the mediator is present only to assist the parties in reaching their own agreement;

d. the circumstances under which the mediator may meet and communicate privately with the parties or with any other person;

e. whether, and under what conditions, communications with the mediator will be held in confidence during the mediation;

f. the inadmissibility of conduct and statements as provided in N.C.G.S. § 7A-38.3D(i);

g. the duties and responsibilities of the mediator and the participants;

h. the fact that any agreement reached will be by mutual consent;

i. the fact that, if the parties are unable to agree and the mediator declares an impasse, the parties and the case will return to court; and

j. the fact that, if an agreement is reached in mediation and the parties agree to request a dismissal of the charges pending in the case, the defendant shall pay a dismissal fee in accordance with N.C.G.S. § 7A-38.7 and N.C.G.S. § 7A-38.3D(m), unless: (i) the court, in its discretion, has waived the fee for good cause; or (ii) the parties agree to some other apportionment. Payment of the dismissal fee shall be made to the clerk of superior court in the county where the case was filed, and the community mediation center must provide the district attorney with a dismissal form and proof that the defendant has paid the dispute resolution fee before the charges can be dismissed.

(2) **Disclosure**. Consistent with the Standards of Professional Conduct for Mediators, the mediator has a duty to be impartial and to advise all participants of any circumstances bearing on possible bias, prejudice, or partiality.

(3) **Declaring Impasse**. Consistent with the Standards of Professional Conduct for Mediators, it is the duty of the mediator to determine timely when an impasse exists and when the mediation should end. The mediator shall inquire of and consider the desires of the parties to cease or continue the mediation.

(4) **Reporting Results of the Mediation**. The mediator or community mediation center shall report the outcome of mediation to the court in writing on a NCAOC form by the date the case is next calendared. If the criminal case is scheduled for court on the same day as the mediation, then the mediator shall inform the attending district attorney of the outcome of the mediation before the close of court on that date, unless alternative arrangements are approved by the district attorney.

(5) **Scheduling and Holding the Mediation**. It is the duty of the mediator and the community mediation center to schedule and conduct the mediation prior to any deadline set by the court. Deadlines shall be strictly observed

by the mediator and the community mediation center, unless the deadline is extended by the court.

Rule 7. Mediator Certification and Decertification

(a) The Commission may receive and approve applications for the certification of persons to be appointed as district criminal court mediators. In order to be certified, an applicant must satisfy the requirements of this subsection.

(1) The applicant must be affiliated, at the time of application, with a community mediation center established under N.C.G.S. § 7A-38.5 as either a volunteer or staff mediator, and must have received the community mediation center's endorsement that he or she possesses the training, experience, and skills necessary to mediate criminal matters in district court.

(2) The applicant must have the following training and experience:

a. The applicant must:

1. have a four-year degree from an accredited college or university; have four years of post-high school education through an accredited college, university, or junior college; have four years of full-time work experience; or have any combination thereof;

2. have two years of experience as a staff or volunteer mediator at a community mediation center; or

3. have an Advanced Practitioner Designation from the Association for Conflict Resolution.

b. The applicant must have completed either:

1. twenty-four hours of training in a Commission certified district criminal court mediation training program; or

2. forty hours of Commission-certified superior court or family financial mediation training and four hours of additional training about the rules, procedures, and practices for mediating criminal matters in district court.

c. The applicant must:

1. observe at least two court-referred district court mediations for criminal matters, conducted by a mediator certified under these rules; and

2. co-mediate or solo-mediate at least three court referred district court mediations for criminal matters, under the observation of staff affiliated with a community mediation center whose district criminal court mediation training program has been certified by the Commission under Rule 8.

The observation, co-mediation, and solo-mediation requirements set forth in this subsection may be waived in the event the applicant demonstrates that she or he has at least five years of experience mediating criminal matters in district court, and the center which the applicant has served verifies the experience claimed.

(3) The applicant must demonstrate familiarity with the statutes, rules, and practices governing mediations for criminal matters in district court in North Carolina;

(4) The applicant must be of good moral character and adhere to the Standards of Professional Conduct for Mediators when acting under these rules. On his or her application(s) for certification or application(s) for certification renewal, an applicant shall disclose any:

a. pending criminal charges;

b. criminal convictions;

c. restraining orders issued against him or her;

d. failures to appear;

e. pending or closed grievances or complaints filed with a professional licensing, certifying, or regulatory body, whether in North Carolina, another state, or another country;

f. disciplinary action taken against him or her by a professional licensing, certifying, or regulatory body, whether in North Carolina, another state, or

another country, including, but not limited to, disbarment, revocation, decertification, or suspension of any professional license or certification, including the suspension or revocation of any license, certification, registration, or qualification to serve as a mediator in another state or country, even if stayed;

g. judicial sanctions imposed against him or her in any jurisdiction; or

h. civil judgments, tax liens, and bankruptcy filings that occurred within the ten years preceding the date that the initial or renewal application was filed with the Commission.

A mediator shall report to the Commission any of the above-enumerated matters arising subsequent to the disclosures reported on the initial or renewal application for certification within thirty days of receiving notice of the matter.

As referenced in this subsection, criminal charges or convictions (excluding infractions) shall include felonies, misdemeanors, or misdemeanor traffic violations (including driving while impaired) under the law of North Carolina or another state, or under the law of a federal, military, or foreign jurisdiction, regardless of whether the adjudication was withheld (prayer for judgment continued) or the imposition of a sentence was suspended.

(5) The applicant must commit to serving as a district court mediator under the direct supervision of a community mediation center authorized under N.C.G.S. § 7A-38.5 for a period of at least two years.

(6) The applicant must comply with the requirements of the Commission for continuing mediator education and training.

(7) The applicant must submit proof of qualifications set out in this rule on a form provided by the Commission.

(b) The Mediation Network of North Carolina, or individual community mediation centers participating in the program, shall assist the Commission in implementing the certification process established in this rule by:

(1) documenting subsection (a) of this rule for the mediator and the Commission;

(2) reviewing the documentation with the mediator in a face-to-face meeting scheduled no less than thirty days from the mediator's request to apply for certification;

(3) making a written recommendation on the applicant's certification to the Commission, which shall come from center staff familiar with the applicant and the applicant's character and experience; and

(4) forwarding the documentation for subsection (a) of this rule and the recommendation to the Commission, along with the mediator's completed certification application form.

(c) A mediator's certification may be revoked or not renewed if, at any time, it is shown to the satisfaction of the Commission that a mediator no longer meets the qualifications described in this rule or has not faithfully observed these rules or those of any district in which he or she has served as a mediator. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible for certification under this rule. Certification renewal shall be required every two years.

(d) A community mediation center may withdraw its affiliation with a mediator who has been certified under these rules. Such disaffiliation does not revoke the mediator's certification. A mediator's certification is portable, and a mediator may agree to be affiliated with a different center. However, to mediate criminal matters in district court under this program, a mediator must be affiliated with the community mediation center providing services in that judicial district. A mediator may be affiliated with more than one center and provide services in the county served by those centers.

A community mediation center that receives or initiates a complaint against a mediator who is affiliated with its program and certified under these rules shall notify the Commission and forward a copy of the complaint to the Commission within thirty days of its receipt by the center, regardless of whether the center was able to successfully resolve the complaint. For purposes of this rule, a "complaint" is a concern raised by a mediation participant, court official, attorney, or community mediation center staff member or volunteer that suggests: (i) that the mediator may have engaged in conduct that violates these rules, the Standards of Professional Conduct for Mediators, or any local court rules adopted to implement the program in a district the mediator serves; or (ii) that the mediator has engaged in conduct that raises an issue about the mediator's character or practice. If a community mediation center withdraws

its affiliation with a mediator who has been certified under these rules, then the community mediation center shall notify the Commission within thirty days of the disaffiliation. The center shall cooperate with the Commission if it investigates any such complaints.

(e) Commission staff shall notify the executive director of the Mediation Network of North Carolina, and the executive director of the community mediation center that is sponsoring the application of an applicant seeking certification as a district criminal court mediator, of any matter regarding the character, conduct, or fitness to practice of the applicant. Staff shall notify the executive director of the Mediation Network of North Carolina and the executive director of the community mediation center with whom a mediator is affiliated of any finding of probable cause by the Commission under Rule 9 of the Rules of the Dispute Resolution Commission, after review of any complaint filed against the mediator alleging an issue of character, conduct, or fitness to practice.

Rule 8. Certification of Mediation Training Programs

(a) Certified training programs for mediators who are seeking certification as district criminal court mediators shall consist of a minimum of twenty-four hours of instruction. The curriculum of such programs shall include the following topics:

(1) Conflict resolution and mediation theory.

(2) Mediation process and techniques, including the process and techniques of mediating criminal matters in district court.

(3) Agreement writing.

(4) Communication and information gathering.

(5) Standards of conduct for mediators including, but not limited to, the Standards of Professional Conduct for Mediators.

(6) Statutes, rules, forms, and practices governing mediations for criminal matters in district court.

(7) Demonstrations of mediations for criminal matters in district court.

(8) Simulations of mediations for criminal matters in district court, involving student participation as the mediator, victim, offender, and attorneys, which shall be supervised, observed, and evaluated by program faculty.

(9) Courtroom protocol.

(10) Domestic violence awareness.

(11) Satisfactory completion of an exam by all students, testing their familiarity with the statutes, rules, and practices governing mediations for criminal matters in district court.

(b) A training program must be certified by the Commission before a mediator's attendance at the program may be used to satisfy the training requirement under this rule. Training programs attended prior to the promulgation of these rules or attended in other states may be approved by the Commission if they are in substantial compliance with the standards set forth in this rule.

(c) Certification renewal shall be required every two years.

Rule 9. Local Rule Making

The chief district court judge of any judicial district conducting mediations under these rules is authorized to publish local rules, not inconsistent with these rules and N.C.G.S. § 7A-38.3D, implementing mediation in that district.

* * *

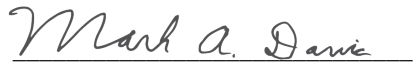
ORDER ADOPTING THE RULES OF MEDIATION FOR FARM NUISANCE DISPUTES

Pursuant to subsection 7A-38.3(e) of the General Statutes of North Carolina, the Court hereby adopts the Rules of Mediation for Farm Nuisance Disputes, which appear on the following pages. These rules supersede the Revised Rules of the North Carolina Supreme Court Implementing the Prelitigation Farm Nuisance Mediation Program, published at 367 N.C. 1099–108.

The Rules of Mediation for Farm Nuisance Disputes become effective on 1 March 2020.

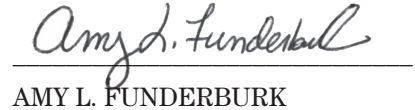
This order shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 23rd day of January, 2020.



For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 23rd day of January, 2020.



AMY L. FUNDERBURK
Clerk of the Supreme Court

Rules of Mediation for Farm Nuisance Disputes

Rule 1. Submission of Dispute to Prelitigation Farm Nuisance Mediation

(a) Mediation shall be initiated by filing a Request for Prelitigation Mediation of Farm Nuisance Dispute, Form AOC-CV-820 (Request Form), with the clerk of superior court in a county in which the action may be brought. The party filing the Request Form shall mail a copy of the Request Form by Certified Mail, return receipt requested, to each party to the dispute.

(b) The clerk of superior court shall accept the Request Form and shall file it in a miscellaneous file under the name of the requesting party.

Rule 2. Exemption from N.C.G.S. § 7A-38.1

A dispute mediated under N.C.G.S. § 7A-38.3 shall be exempt from the provisions of N.C.G.S. § 7A-38.1.

Rule 3. Selection of the Mediator

(a) **Time Period for Selection**. The parties to the dispute shall have twenty-one days from the date of the filing of the Request Form to select a mediator to conduct their mediation and to file an Appointment of Mediator in Prelitigation Farm Nuisance Dispute, Form AOC-CV-821 (Appointment Form).

(b) **Selection of the Certified Mediator by Agreement**. The clerk of superior court shall provide each party to the dispute with a list of certified superior court mediators serving the judicial district encompassing the county in which the Request Form was filed. If the parties are able to agree on a mediator from that list to conduct their mediation, then the party who filed the Request Form shall notify the clerk of superior court by filing an Appointment Form. The Appointment Form shall state: (i) the name, address, and telephone number of the certified mediator selected; (ii) the rate of compensation to be paid to the mediator; and (iii) that the mediator and the parties to the dispute have agreed on the selection and the rate of compensation.

(c) **Court Appointment of the Mediator**. If the parties to the dispute cannot agree on the selection of a certified superior court mediator, then the party who filed the Request Form shall file an Appointment Form with the clerk of superior court, moving the senior resident superior court judge to appoint a certified superior court mediator. The Appointment Form shall be filed with the clerk of superior court within twenty-one days of the date of the filing of the Request Form. The Appointment Form shall state whether any party prefers the mediator

to be a certified attorney mediator or a certified nonattorney mediator. If the parties state a preference, then the senior resident superior court judge shall appoint a mediator in accordance with that preference. If no preference is expressed, then the senior resident superior court judge may appoint any certified superior court mediator.

As part of the application or annual certification renewal process, all mediators shall designate those judicial districts for which they are willing to accept court appointments. Each designation shall be deemed to be a representation that the designating mediator has read and will abide by the local rules for, and will accept appointments from, the designated district, and will not charge for travel time and expenses incurred in carrying out his or her duties associated with those appointments. A mediator's refusal to accept an appointment in a judicial district designated by the mediator may be grounds for removal from that district's court appointment list by the Dispute Resolution Commission (Commission), or by the senior resident superior court judge.

The Commission shall provide the senior resident superior court judge of each judicial district a list of those certified superior court mediators requesting appointments in that district. The list shall contain each mediator's name, address, and telephone number. The list shall be provided to the senior resident superior court judge electronically through the Commission's website at https://www.ncdrc.gov.

The Commission shall promptly notify the senior resident superior court judge of any disciplinary action taken with respect to a mediator on the list of certified mediators for the judicial district.

(d) **Mediator Information Directory**. To assist parties in learning more about the qualifications and experience of certified mediators, the Commission shall post a list of certified superior court mediators on its website at https://www.ncdrc.gov, accompanied by each mediator's contact and biographical information, availability, and whether the mediator is willing to mediate farm nuisance disputes.

Rule 4. The Prelitigation Farm Nuisance Dispute Mediation

(a) **When the Mediation Is to Be Completed**. The mediation shall be completed within sixty days of either the filing of an Appointment Form that selects a mediator by agreement or the entry of an order that appoints a mediator to conduct the mediation.

(b) **Extending the Deadline for Completion**. The senior resident superior court judge may extend the deadline for completion of the mediation upon the judge's own motion, upon stipulation of the parties, or upon the suggestion of the mediator.

(c) **Where the Mediation Is to Be Held**. The mediated settlement conference shall be held in any location agreeable to both the parties and the mediator. If the parties cannot agree to a location, then the mediator shall be responsible for reserving a neutral place in the county in which the Request Form was filed, for making arrangements for the conference, and for giving timely notice of the time and location of the conference to all attorneys, pro se parties, and other persons required to attend.

(d) **Recesses.** The mediator may recess the mediation at any time and may set a time for reconvening, except that the time for reconvening must fall within a thirty-day period from the date of the order appointing the mediator. No further notification is required for persons present at the recessed mediation session.

(e) **Duties of the Parties, Attorneys, and Other Participants**. Rule 4 of the Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions is hereby incorporated by reference.

(f) **Sanctions for Failure to Attend**. Rule 5 of the Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions is hereby incorporated by reference.

Rule 5. Authority and Duties of the Mediator

(a) **Authority of the Mediator**.

(1) **Control of the Mediation**. The mediator shall at all times be in control of the mediation and the procedures to be followed. The mediator's conduct shall be governed by the Standards of Professional Conduct for Mediators.

(2) **Private Consultation**. The mediator may communicate privately with any participant prior to, and during, the mediation. The fact that private communications have occurred with a participant shall be disclosed to all other participants at the beginning of the mediation.

(3) **Scheduling the Mediation**. The mediator shall make a good faith effort to schedule the mediation at a time that is convenient to the participants, attorneys, and mediator. In the absence of agreement, the mediator shall select the date for the mediation.

(b) **Duties of the Mediator**.

(1) **Informing the Parties**. At the beginning of the mediation, the mediator shall define and describe for the parties:

a. the process of mediation;

b. the differences between mediation and other forms of conflict resolution;

c. the costs of mediation;

d. the fact that mediation is not a trial, that the mediator is not a judge, and that the parties may pursue their dispute in court if mediation is not successful;

e. the circumstances under which the mediator may meet and communicate privately with any of the parties, or with any other person;

f. whether, and under what conditions, communications with the mediator will be held in confidence during the mediation;

g. the inadmissibility of conduct and statements as provided by N.C.G.S. § 7A-38.1(*l*);

h. the duties and responsibilities of the mediator and the participants; and

i. the fact that any agreement reached will be reached by mutual consent.

(2) **Disclosure**. The mediator has a duty to be impartial and to advise all participants of any circumstances bearing on possible bias, prejudice, or partiality.

(3) **Declaring Impasse**. It is the duty of the mediator to determine timely when an impasse exists and when the mediation should end.

(4) **Scheduling and Holding the Mediation.** It is the duty of the mediator to schedule and conduct the mediation within the time frame established by Rule 4. The mediator shall strictly observe Rule 4 unless an extension has been granted in writing by the senior resident superior court judge.

(5) **No Recording**. There shall be no stenographic, audio, or video recording of the mediation process by any participant. This prohibition includes recording either surreptitiously or with the agreement of the parties.

Rule 6. Compensation of the Mediator

(a) **By Agreement**. When the mediator is stipulated to by the parties, compensation shall be as agreed upon between the parties and the mediator, except that no administrative fee or fees for services shall be

assessed against a party if all parties waive mediation prior to the occurrence of an initial mediation session.

(b) **By Court Order**. When the mediator is appointed by the court, the parties shall compensate the mediator for mediation services at the rate of $150 per hour. The parties shall also pay to the mediator a one-time, per-case administrative fee of $150, except that no administrative fee or fees for services shall be assessed against a party if all parties waive mediation prior to the occurrence of an initial mediation meeting.

(c) **Indigent Cases**. No party found to be indigent by the court for the purposes of these rules shall be required to pay a mediator's fee. Any mediator conducting a mediation under these rules shall waive the fee requirement for parties found by the court to be indigent. Any party may move the senior resident superior court judge for a finding of indigency and to be relieved of that party's obligation to pay a share of the mediator's fee.

The motion shall be heard subsequent to the completion of the mediation or, if the parties do not settle their dispute, subsequent to trial. In ruling upon such motion, the judge shall apply the criteria in N.C.G.S. § 1-110(a) but shall take into consideration the outcome of the action and whether a judgment was rendered in the movant's favor. The court shall enter an order granting or denying the party's request for a finding of indigency.

(d) **Postponement Fee**. As used in this rule, "postponement" means to reschedule or not proceed with a mediation once a date for the mediation has been agreed upon and scheduled by the parties and the mediator. After a mediation has been scheduled for a specific date, a party may not unilaterally postpone the mediation. A mediation may be postponed only after notice to all parties of the reason for the postponement, payment of a postponement fee to the mediator, and after consent is given by the mediator and the opposing attorney. If the mediation is postponed within seven business days of the scheduled date, then a postponement fee shall be assessed. The postponement fee shall be $300 if the mediation is postponed within three business days of the scheduled date, and $150 if the mediation is postponed more than three business days, but less than seven business days, prior to the scheduled date. Postponement fees shall be paid by the party requesting the postponement, unless otherwise agreed to by the parties. Postponement fees are in addition to the one-time, per-case administrative fee provided for in subsection (b) of this rule.

(e) **Payment of Compensation by Parties**. Unless otherwise agreed to by the parties or ordered by the court, the mediator's fee shall be paid in equal shares by the parties. For purposes of this rule,

multiple parties shall be considered one party when they are represented by the same counsel. Parties obligated to pay a share of the mediator's fee shall pay the fee equally. Payment shall be due upon completion of the mediation.

(f) **Sanctions for Failure to Pay the Mediator's Fee.** Willful failure of a party to make timely payment of that party's share of the mediator's fee (whether the one-time, per-case administrative fee, the hourly fee for mediation services, or any postponement fee), or willful failure of a party contending indigent status to promptly move the senior resident superior court judge for a finding of indigency, shall constitute contempt of court and may result, following notice, in a hearing and the imposition of monetary sanctions by a resident or presiding superior court judge.

Comment

Comment to Rule 6(b). Court-appointed mediators may not be compensated for travel time, mileage, or any other out-of-pocket expenses.

Comment to Rule 6(d). Though Rule 6(d) provides that mediators shall assess a postponement fee, it is understood that there may be rare situations in which the circumstances occasioning a request for a postponement are beyond the control of the parties (e.g., an illness, serious accident, or unexpected and unavoidable trial conflict). If a party takes steps to notify the mediator as soon as possible in such circumstances, then the mediator may, in his or her discretion, waive the postponement fee.

Nonessential requests for postponements work a hardship on parties and mediators and serve only to inject delay into a process and program designed to expedite settlement. As such, it is expected that mediators will assess a postponement fee in all instances where a request does not appear to be absolutely warranted. Moreover, mediators are encouraged not to agree to postponements in instances where, in their judgment, the mediation could be held as scheduled.

Comment to Rule 6(e). If a party is found by a senior resident superior court judge to have failed to attend a mediation without good cause, then the court may require that party to pay the mediator's fee and related expenses.

Comment to Rule 6(f). If the Prelitigation Farm Nuisance Mediation Program is to be successful, it is essential that mediators, both party-selected and court-appointed, be compensated for their services. Rule 6(f) is intended to give the court express authority to enforce payment of fees owed to both party selected and court-appointed mediators. In instances where the mediator is party selected, the court may enforce fees which exceed the caps set forth in Rule 6(b) (hourly fee and administrative fee) and Rule 6(d) (postponement fee and cancellation fee), or which provide for payment of services or expenses not provided for in Rule 6, but agreed to among the parties (e.g., payment for travel time or mileage).

Rule 7. Waiver of Mediation

The parties to a farm nuisance dispute may waive mediation

by informing the mediator of their waiver in writing. The party who requested mediation shall file a Waiver of Prelitigation Mediation in Farm Nuisance Dispute, Form AOC-CV-822 (Waiver Form), with the clerk of superior court and shall mail a copy of the Waiver Form to the mediator and all parties named in the Request Form.

Rule 8. Mediator's Certification that the Mediation Has Concluded

(a) **Contents of Certification**. Following the conclusion of mediation or the receipt of a Waiver Form signed by all parties to the farm nuisance dispute, the mediator shall prepare a Mediator's Certification in Prelitigation Farm Nuisance Dispute, Form AOC-CV-823 (Certification Form). If a mediation was held, then the Certification Form shall state the date on which the mediation was concluded and report the general results of the mediation. If a mediation was not held, then the Certification Form shall either: (i) state why a mediation was not held and identify any parties named in the Request Form who failed, without good cause, to attend or participate in mediation; or (ii) state that all parties waived mediation in writing under Rule 7.

(b) **Deadline for Filing Mediator's Certification**. The mediator shall file the completed Certification Form with the clerk of superior court within seven days of either the completion of the mediation, the failure of the mediation to be held, or the receipt of a signed Waiver Form. The mediator shall serve a copy of the Certification Form on each of the parties named in the Request Form.

Rule 9. Certification of Mediation Training Programs

The Commission may specify a curriculum for a farm nuisance dispute mediation training program and may set qualifications for trainers.

* * *

COMMERCIAL PRINTING COMPANY
PRINTERS TO THE SUPREME COURT AND THE COURT OF APPEALS